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THE

AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,

AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXVII.

SAN FRANCISCO:

BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1899.

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AMERICAN STATE REPORTS.

VOL. LXVII.

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VOL. LXVII.

CASES

IN THE

SUPREME COURT

OF

ALABAMA.

ADAMS *v.* STATE.

[115 ALABAMA, 90.]

INSTRUCTIONS, IF MISLEADING, SHOULD BE REFUSED.—A charge, though technically correct, may be so expressed as to mislead the jury; and a court should always refuse to give such a charge.

INSTRUCTIONS — CRIMINAL LAW — REASONABLE DOUBT—"A FIXED CONVICTION".—There is no error in refusing to instruct the jury, in a criminal case, that they "are not satisfied beyond a reasonable doubt" unless they have "a fixed conviction" of the truth of the charge, for such an instruction is calculated to mislead them, on account of the ambiguous words, "a fixed conviction."

Indictment for the larceny of an overcoat and pistol from a dwelling-house. The property stolen belonged to William M. Ellis, who was introduced as a witness by the state. Ellis testified that, on September 1, 1896, he missed his overcoat and pistol from his room; that he never saw the pistol afterward, but that, in December, 1896, he did see the defendant wearing his overcoat. He testified that the overcoat was his, and stated certain facts which enabled him to identify it. This was the testimony for the state, and the defendant moved to exclude the evidence and discharge him. His motion was overruled, and the defendant excepted. The defendant's testimony tended to show that one Jones gave him an overcoat similar to the one described by Ellis, and that it was this coat which he had on when Ellis saw him. The first charge requested by the defendant was as follows: "If the jury believe the evidence in this case, they must find the defendant not guilty." The second

charge requested by him is in the opinion. Each charge was refused, and the defendant excepted.

Miller & Kirven and Abrahams & Canterbury, for the appellant.

William C. Fitts, attorney general, for the state.

[91] COLEMAN, J. The defendant was convicted of petit larceny. After the evidence had closed, the defendant requested the court to instruct the jury as follows: "After considering all the evidence in this case, unless you can say that you have a fixed conviction of the truth of the charge, you are not satisfied beyond a reasonable doubt, and should not convict the defendant."

First, is the charge expressed in that plain, simple, and unambiguous language which should characterize instructions to a jury? Louisville etc. R. R. Co. v. Hall, 87 Ala. 723; 13 Am. St. Rep. 84; Peterson v. State, 74 Ala. 34. Counsel for appellant have submitted an argument to show that the legal effect of the charge was the same as if requested to charge that "unless the jury were satisfied beyond a reasonable doubt of the defendant's guilt they should acquit." If no more was intended, we may well inquire why the instruction was expressed in the language selected. We are satisfied that the presiding judge was of the opinion that the instruction, as framed, required something more than that the jury should be satisfied beyond a reasonable doubt, and refused to give the charge for this reason. The jury might have believed from the charge requested that, before a verdict of guilty could be returned, there should be a conviction of guilt, unchangeable, immovable by any amount of other evidence. We have some difficulty ourselves in determining exactly what meaning was intended by "a fixed conviction." A charge may be technically correct, yet it may be expressed in such a way as to be calculated to mislead the jury. A court should always refuse such charges: 3 Brickell's Digest, sec. 85, p. 112; Knowles v. Ogletree, [92] 96 Ala. 555. Whatever may have been intended, we are satisfied it was calculated to mislead the jury, and there was no error in refusing it.

The other questions reserved are unimportant. It was for the jury to say whether the possession of the property was explained. The prosecution did not depend entirely upon the fact of possession. There was other evidence to show the opportunity of the defendant to steal the property.

Affirmed.

INSTRUCTIONS, MISLEADING — REASONABLE DOUBT.— Charges to juries should be simple and free from a tendency to mislead. A charge, if misleading, should be refused, although on dissection it may assert a correct legal proposition: Louisville etc. R. R. Co. v. Hall, 87 Ala. 708; 13 Am. St. Rep. 84; Carson v. Stevens, 40 Neb. 112; 42 Am. St. Rep. 661; Perot v. Cooper, 17 Colo. 80; 31 Am. St. Rep. 258. Reasonable doubt is defined in the monographic note to Burt v. State, 48 Am. St. Rep. 566-579, showing what are misleading instructions on the point.

BALKUM *v.* STATE.

[115 ALABAMA, 117.]

ASSAULT AND BATTERY—EVIDENCE OF CHARACTER —CROSS-EXAMINATION.—If a man is charged with assault and battery upon a woman, and she, upon his trial, testifies that he came to her house during the absence of her husband, and said to her: "I want you to be mine and let me do what I want to with you," and that he approached her, put his arms around her, and started with her toward a bed, when she got loose from him, he is guilty as charged, if such testimony is true; and, if he introduces evidence of his good character, it is proper, on the examination of witnesses who testify to his good character, to bring out the fact that his general character for "running after women" is bad.

Sollie & Kirkland, for the appellant.

William C. Fitts, attorney general, for the state.

118 COLEMAN, J. The defendant was convicted of an assault and battery upon one Martha Best. On the trial, she testified that defendant came to her house during the absence of her husband, and said to her, "I want you to be mine and let me do what I want to with you"; that he approached her and put his arms around her, and started with her toward the bed, when she got loose from him, et cetera. If this testimony was true, the defendant was guilty as charged. The defendant introduced evidence of his good character. On cross-examination, many of the witnesses who testified to the good character of the defendant, in answer to questions propounded by the state's solicitor, testified that the general character of the defendant "was bad for running after women." Both the question and answer were objected to by the defendant, but his objections were overruled. We are of opinion the court ruled correctly in admitting the testimony. There can be no misunderstanding of what was meant by the question and answer, "that his character was bad for running after women." We regard the case of Cauley v. State, 92 Ala. 71, and the reasoning of the court, as a direct authority upon the question in support of the admissibility of the

evidence. We find no other question worthy of consideration in the record.

Affirmed.

CRIMINAL LAW—EVIDENCE OF CHARACTER—CROSS-EXAMINATION.—Evidence of character, to be admitted in a criminal case, must be confined to the trait in issue: See notes to O'Bryan v. O'Bryan, 53 Am. Dec. 134; Wachstetter v. State, 50 Am. Rep. 99; and, when so confined, the prosecution may, on cross-examination, investigate such trait Wachstetter v. State, 99 Ind. 290; 50 Am. Rep. 94.

SHAHAN *v.* ALABAMA GREAT SOUTHERN RAILROAD CO.

[115 ALABAMA, 181.]

ADVERSE POSSESSION — PRESUMPTION — ADVERSE USER.—The adverse claim of a right, and its exercise, uninterruptedly and without objection, for a period of ten years, raises a presumption that the right was lawfully acquired, and bars redress for its rightful exercise; but a right by adverse user does not accrue until there is an adverse user.

ADVERSE POSSESSION—INSUFFICIENT PLEA OF ADVERSE USER.—In an action to recover damages against a railroad company for an injury resulting from an overflow of water from rainfall caused by embankments and culverts, which obstructed its natural flow, a plea which merely avers that the defendant constructed its embankments and culverts more than ten years prior to the injury, and has maintained them in the same condition ever since, without more, is insufficient as a plea of adverse user.

ADVERSE POSSESSION—SUFFICIENT PLEA OF ADVERSE USER.—In an action to recover damages against a railroad company for an injury resulting from an overflow of water from rainfall caused by embankments and culverts, which obstructed the natural flow, a plea that, by reason of the embankments and culverts, the water had overflowed to the same extent, at intervals, during ten years prior to the injury, without complaint from the plaintiff, and that the results had been acquiesced in by the plaintiff, would be good.

PLEADING—WHEN A GENERAL DEMURRER SHOULD BE OVERRULED.—If the statute requires that a demurrer shall distinctly state or specify in what the objection or defect consists, it is proper to overrule a general demurrer to pleas, such as one declaring that the pleas fail to state facts material and relevant to the issue.

APPEAL — PLEADING — GENERAL ISSUE — SPECIAL PLEAS—AFFIRMANCE OF JUDGMENT.—If a case is tried by the court alone, upon its merits, under the plea of the general issue, and without any reference to the special pleas of the defendant, the judgment must be referred to the general plea, and must be affirmed, if it is authorized by the facts under such plea, although there may have been error in overruling a demurrer to some of the special pleas.

RAILROADS — OBSTRUCTED CULVERTS — FLOODING PROPERTY—LIABILITY.—A railroad company is answerable in damages for flooding the plaintiff's store where it is caused by obstructions which prevent the escape of water, coming from a rain-

fall, through and beyond the culvert under the defendant company's embankment or roadbed.

RAILROADS — OBSTRUCTED CULVERTS — FLOODING PROPERTY—CONTRIBUTION TO INJURY—LIABILITY.—A railroad company is answerable in damages for flooding a person's property, by allowing its culvert under the roadbed or embankment to become obstructed, so as not to carry off the water, where its negligence contributes proximately to the injury, although another company, or other causes, may have also contributed to the result.

RAILROADS — OBSTRUCTED CULVERTS — FLOODING PROPERTY — CO-OPERATION OF SPURTRACK IN CAUSING INJURY—PROPER CROSS-EXAMINATION.—In an action to recover damages against a railroad company for overflowing the premises of the plaintiff, by allowing a culvert under its embankment or roadbed to become obstructed, so as to prevent the escape of water coming from a rainfall, there can be no recovery where it is shown that there would have been no overflow had the defendant not constructed a spurtrack for the convenience of the plaintiff. Hence, there is no error in permitting the defendant, on cross-examination, to prove that the spurtrack was built at the plaintiff's request.

Action brought by the appellant, W. P. Shahan, against the appellee, the railroad company, to recover damages sustained by reason of an overflow of water in a storehouse where the plaintiff was doing business. The storehouse stood near the railroad track, and a spurtrack, put in by the defendant at the plaintiff's request, passed by the plaintiff's storehouse to reach his warehouse. The defendant's roadbed, near the storehouse, was a solid earth embankment, or dam, about nine hundred feet long, under which the defendant had constructed two culverts or openings for the outlet of water during rainfall. The defendant pleaded the general issue, the statute of limitations of one year, and special pleas mentioned in the opinion. Demurrers to the pleas were interposed as shown in the opinion. The eighth plea set up contributory negligence of the plaintiff in failing to protect his building and property from the alleged injury and damage. There was a judgment for the defendant, and the plaintiff appealed.

S. W. Johnston and Caldwell, Johnson & Acker, for the appellant.

Amos E. Goodhue, for the appellee.

188 COLEMAN, J. The plaintiff, Shahan, instituted this action to recover damages sustained in consequence of an overflow of water into his storehouse in Attalla, in which he was engaged in merchandising. The overflow was caused by rainfall the 15th of February, 1893. 189 The cause of action contained in the ab-

stract is not very clearly stated, but as we construe the first count, though it charges negligence of the defendant in constructing its embankments and culverts, et cetera, the gist of the complaint is the averred negligence of the defendant "in failing to construct and maintain sufficient openings for the passage of water which fell on that day." We are not certain whether the second count avers two separate and independent causes of action, or that the two causes stated combined and co-operated to cause the damage. We are inclined to the latter view. These features of the complaint were not objected to by defendant, and, as both counts present a sufficient cause of action, we will review the questions without further consideration of the form of the complaint.

The defendant pleaded the general issue, and special pleas 4, 5, 6, 8, 9, and 10. The plaintiff demurred to the special pleas, and the ruling of the court overruling the demurrer is assigned as error. The fourth, fifth, and sixth pleas were intended to set up a prescriptive right, in bar of the action, acquired by adverse user of ten years. A right by adverse user does not begin to accrue until there is an adverse user. The adverse claim of a right and its exercise uninterruptedly and without objection for a period of ten years raises the presumption that the right was rightfully acquired, and bars redress for its rightful exercise. A plea, therefore, which merely avers that defendant constructed its embankments and culverts more than ten years prior to the injury, and has maintained them in the same condition ever since, without more, is not an answer to a complaint claiming damages for an injury resulting from an overflow of water from rainfall caused by the embankments and defective culverts, which obstructed its natural flow. The plea should go farther and show that like effects resulted by reason of the embankments and culverts, to wit, the overflow of water to the same extent had occurred at intervals during the ten years, of which the plaintiff made no complaint, but acquiesced therein. The fourth plea avers "a throwing back of the water as complained of in plaintiff's complaint." Although not clear, it may be that this plea is sufficient. The fifth and sixth pleas are faulty, and the demurrer should have been [190] sustained: Savannah etc. Ry. Co. v. Buford, 106 Ala. 303; Nininger v. Norwood, 72 Ala. 277; 47 Am. Rep. 412.

The demurrer to the ninth and tenth pleas was general. We would not be understood as holding that these pleas presented a valid answer to the complaint, but our rulings are, that the

statute requires that the demurrer shall distinctly state or specify in what the objection or defect consists: Code 1886, sec. 2690, and authorities.

Issue being joined upon the pleas, the case was tried by the court without a jury. The appellee contends that, this being true, the judgment of the court for the defendant, being general, must be affirmed, if the plea of the general issue or any good plea upon which issue was properly joined was sustained by the evidence.

It is evident from the proceedings of the trial, and from the opinion of the trial judge which is before us, that the case was tried upon its merits under the plea of the general issue, and without any reference to the special pleas of the defendant. Under these circumstances, if the judgment was authorized by the facts under the plea of the general issue, the judgment must be referred to this plea, and be affirmed, notwithstanding the error in overruling the demurrer to the fifth and sixth pleas: Morton v. Bradley, 30 Ala. 683; Raney v. Raney, 80 Ala. 157; Foster v. Johnson, 70 Ala. 249. We will examine the evidence as it is shown in the abstract. Plaintiff's storehouse was on lot 5, north from defendant's embankment. fronting toward Third street and between Second and Third avenue. The rear end of the store abutted on defendant's right of way, some fifty feet from the embankment, and was located about four hundred feet south from defendant's culvert. Precision as to distances is not material. The embankment was constructed not later than 1873, and the culvert not later than 1881. The natural flow of the water was from northwest toward defendant's culvert, and the weight of the evidence shows that, if undisturbed, it would pass through the culvert and southward, north of plaintiff's store and without overflowing it. That plaintiff's store was in part submerged with rain water and his goods damaged on the night of the 15th of February, 1893, is not controverted. The evidence shows that the opening of defendant's culvert was four feet by four feet, furnishing a carrying capacity of sixteen square feet. The evidence also [191] shows that on the night of the rainfall the culvert was filled with sand and gravel and debris to a depth of about two and a half feet, leaving only one and a half feet at the top for the escape of water. Evidently the water would accumulate at the mouth or entrance of the culvert to a depth of two and a half feet before any of it could pass through the culvert. Although no witnesses seem to have been directly interrogated as to the relative grades of the floor of the store to

that of the bottom of the culvert, the testimony of two civil engineers and of Dr. Dozier shows with reasonable satisfaction that the floor of the store was from two and a half to three feet lower than the opening of the culvert when filled with sand and debris, as it was at the time, and all the evidence shows that the water ran from the culvert on the north side along the embankment, opposite and beyond the store, covering the space between the store and the embankment. The evidence also shows that defendant had constructed a ditch along the embankment between it and the store, and that the flow of the water along this ditch after it failed to pass through the culvert was obstructed to some extent by a bridge over this ditch and a spurtrack, and caused the water to flow back toward the store of the plaintiff. There is no evidence to show that defendant was under any duty to construct or maintain this ditch, other than such as arose from defendant's general duty not to obstruct the natural flow of the water to the detriment of the upper easements. There is evidence also for the defendant, which showed that on account of the excessive rainfall, the water overflowed a city bridge over a ditch or drain on Third street, and ran down Third street to Third avenue, into a pond opposite plaintiff's store, and from thence ran across to plaintiff's store. We have examined the evidence very carefully on this point, and we are not satisfied that the overflow of plaintiff's store can be attributed to this cause. The evidence shows that plaintiff's store was between the pond and embankment, and the water that ran from the culvert down along the embankment could not escape, and that it covered the entire space between the embankment and the pond. Our conclusion, furthermore, is, that if the water had not been obstructed at the culvert, it is probable that there would have been but little, if any, overflow at the bridge on Third street. The evidence [192] tends to this conclusion, and it is uncontroverted that the subsequent rain in April, after the culvert had been cleaned out, exceeded in quantity that of February, and that there was no overflow at that time from the bridge on Third street. A fair consideration of all the evidence leads to the conclusion that the overflow of plaintiff's store was caused by obstructions which prevented the escape of the water through and beyond the culvert under defendant's embankment.

This brings us to the consideration of defendant's other ground of defense. The evidence shows that about four hundred feet from defendant's embankment on the south side, there are two other railroad embankments, the first that of the Tennessee

& Coosa Railroad, and the second that of the Anniston & Cincinnati Railroad, that the culverts under these embankments are much higher than the culvert of defendant, and are too small and insufficient to furnish outlet for the water and sand, which pass through the culvert of defendant, and in consequence the land between the defendant's embankment and these two embankments, over which defendant has no control, has been filled and raised, until it is two feet higher than the bottom of defendant's culvert. The effect of this, it is contended, is to cause the water and sand to accumulate and fill up the drain between the culvert of defendant and the culverts under the other embankments, so that it became impossible in this condition to keep the defendant's culvert at all times open. The Tennessee & Coosa Railroad embankment and that of defendant come together, according to the map in evidence, about six hundred feet south of a line running between the culverts of the two roads. How much of this entire triangle formed by the two embankments and a line running between the culverts has been raised or whether the defendant has permitted the sand and water to accumulate on its own right of way does not satisfactorily appear from the evidence. As the land is lower between these embankments by eighteen inches or two feet than on the north side of defendant's embankment, where the plaintiff's store is situated, we are unable to see why defendant could not have provided an escape for the water over its own right of way, at least to the ravine between the hotel and depot. The plaintiff having introduced evidence which made out a prima facie case, the burden [193] was cast upon the defendant to overcome it. This the defendant undertakes to do by showing that the negligence of the Tennessee & Coosa Railroad was the proximate cause of the injury, and not its own. To relieve itself, it must show that its own negligence did not contribute proximately to the injury. The other railroads may have co-operated in degree in causing the injury, but, as we view the evidence in the record, their negligence was not the sole cause.

There was no error in permitting the defendant on cross-examination to prove that the spurtrack was built at plaintiff's request, and if it be shown that there would have been no overflow, but for the spurtrack, constructed for the convenience of the plaintiff and at his request, he would not be entitled to recover: Mayor etc. v. Coleman, 58 Ala. 570. If, however, the overflow resulted from the obstruction caused by the little bridge placed by defendant over its own ditch, which ran be-

tween plaintiff's store and the embankment of the defendant, we are of the opinion the defendant would be held guilty of proximate negligence whether the water came from the culvert alongside defendant's embankment, or across from the pond. If the embankment obstructed the natural flow of the water and caused the overflow of the store, the defendant would be liable, although other causes may have also contributed to the result.

Under all the circumstances, it seems to us the ends of justice would be better promoted by remanding the cause than by rendering a final judgment here.

Reversed and remanded.

PRESCRIPTION — ADVERSE USER — MAINTAINING CULVERTS — OVERFLOWING LAND.—A right, by prescription, to maintain a culvert, so constructed as to cause the plaintiff's land to be overflowed, may be acquired by a railroad company by user for twenty years; but the user must have been such as to have subjected the company to an action at any time during the twenty years, and the burden is on the company to show that, at regular or irregular intervals during the twenty years, the water has overflowed the very land in controversy: Emery v. Raleigh etc. R. R. Co., 102 N. C. 209; 11 Am. St. Rep. 727.

RAILROADS — CULVERTS — NEGLIGENCE — LIABILITY.—A railroad company is answerable in damages to a landowner for its negligence in the construction or maintenance of an embankment without proper and sufficient culverts or openings for the passage of a natural watercourse: Ohio etc. Ry. Co. v. Thillman, 143 Ill. 127; 36 Am. St. Rep. 359, and note, showing that it must also provide against ordinary freshets. Compare Railway Co. v. Mossman, 90 Tenn. 157; 25 Am. St. Rep. 670; and note to Columbus etc. Ry. Co. v. Bridges, 11 Am. St. Rep. 65.

WESTERN ASSURANCE COMPANY OF TORONTO *v.* MCGLATHERY.

[115 ALABAMA, 213.]

INSURANCE—ACTION UPON POLICY WITH "IRON SAFE CLAUSE"—REPLICATION, WHEN SUFFICIENT.—If the defendant, in an action upon a policy of fire insurance, pleads that the plaintiff did not keep a set of books, clearly and plainly presenting "a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," as required by the "Iron Safe Clause" of the policy, a replication thereto is sufficient where it avers that the plaintiff "had substantially kept a set of books from which the loss could have been ascertained."

INSURANCE—ACTION UPON POLICY WITH "IRON SAFE CLAUSE"—REPLICATION, WHEN INSUFFICIENT.—If the defendant, in an action upon a policy of fire insurance, after setting out the "Iron Safe Clause" of the policy in a special plea, avers, as a breach, that the plaintiff "did not keep a set of books as therein provided," a replication to such plea, averring that the plaintiff "had substantially kept a set of books from which the

loss could have been ascertained," and that he had offered to produce "books and evidence" to meet the defendant's demand for books claimed by defendant to be necessary, which offer was refused by the defendant, is insufficient, on demurrer, because it does not show that the books offered were such as the plaintiff was required to keep.

INSURANCE—ACTION UPON POLICY WITH "IRON SAFE CLAUSE"—DELIVERY OF INVENTORIES—DEFENSE—DEMURRABLE PLEA.—If one of the conditions of a fire insurance policy upon a stock of goods is, that the insured will make a complete inventory of stock on hand, and, upon demand, after loss, deliver the last preceding inventory to the insurance company, the "last preceding inventory" required by such condition is that which was taken next preceding the issuance of the policy. Hence, it is no defense to an action thereon to plead that inventories were taken in May and December of the year preceding the issuance of the policy, and that the nondelivery of the inventory taken in May was a breach of the condition. Such a plea is demurrable.

INSURANCE—ACTION UPON POLICY—SUBMISSION OF INSURED, AFTER LOSS, TO EXAMINATION—REPLICATION, SUFFICIENCY OF.—If the insured is required, by the terms of a policy of fire insurance, to submit himself, after a loss, to an examination, under oath, by anyone whom the insurance company may name, it must give him notice to submit to such examination, or the requirement is waived. Hence, if the defendant pleads, in an action upon the policy, that the plaintiff had failed to submit to an examination as required by the policy, a reply to the plea is sufficient, and not demurrable, where it avers that no notice was given to the plaintiff, but that notice was given to her husband, who, as her agent, appeared and was examined, for such facts, if true, show that the company waived a personal examination of the insured.

Action brought by the appellee, D. R. McGlathery, against the appellant insurance company, to recover for the loss of a stock of goods by fire, covered by the defendant's policy. The defendant pleaded the general issue. It also specially pleaded a breach of the warranties contained in the "Iron Safe Clause" of the policy. By this clause, set up in the second plea, the insured was required to keep books and inventories, and to produce them in case of loss. It required him to keep a set of books clearly and plainly presenting "a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit." He was also required by it to keep such books and inventory, and also the "last preceding inventory," if such was taken, securely locked in a fire-proof safe at night, or in such a way as to preserve them at all times from destruction. The defendant, in its second plea, alleged: 1. That the plaintiff did not keep a set of books, as provided in the "Iron Safe Clause"; 3. That the plaintiff failed to produce the books for the inspection of the company after the alleged loss. The plaintiff filed the following replications to the second plea:

1. There was a substantial compliance with the conditions set out in said plea; 2. That the plaintiff "had substantially kept a set of books from which the loss could have been ascertained," and that he had offered to produce "books and evidence" to meet the defendant's demand for books claimed by the latter to be necessary, but that the defendant refused to allow the plaintiff to do so, or to receive such books and proof. The gravamen of the tenth plea appears in the opinion. There was a stipulation in the policy requiring the insured, in case of loss, to submit to an examination, under oath, by any one whom the insurance company would name. There was a judgment for the plaintiff and the defendant appealed.

Alex. T. London and John London, for the appellant.

J. F. Gillespie and W. C. Ward, for the defendant.

[222] BRICKELL, C. J. A replication, answering a plea but in part, leaving a material part unanswered, is bad on demurrer. There must, however, be a material part of the plea unanswered, or there is no room or reason for the application of the rule. The part of the second plea it is supposed the replication leaves unanswered is a mere negation that the plaintiff kept the books, which, under the clause of the policy set out in the plea, he was under the duty of keeping, in the precise manner and place prescribed in the clause. There is no denial that the plaintiff kept the books, nor that they were preserved from loss or injury, ready to be produced for the inspection of the defendant, and as matter of evidence on the adjustment of the loss. The rule is elementary that pleadings must be construed most strongly against the pleader. If a plea admits of two constructions, that construction will be adopted least favorable to the pleader: 2 Brickell's Digest, sec. 32, p. 232. The plea admits of the construction that the books were kept and preserved, ready for production, though they may not have been kept in literal accordance with the clause of the policy. [223] If this be true, unless substance be sacrificed to mere form and ideas to mere words, the duty of the plaintiff and all the purposes of the clause were satisfied. The defendant was as fully protected against the fraud or imposition of the plaintiff as he would or could have been if there had been literal compliance; and it is his protection the clause intends. The plea, in this respect, presents an immaterial issue, and the rule of pleading to which we have referred does not require that a replication should answer matter on which a material issue cannot be founded.

The next question arising on the demurrers to this replication is, whether the facts stated in the replication showed that the plaintiff had satisfied the requirements of the policy in reference to the keeping of books, clearly and plainly presenting "a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit," et cetera. The averments of the replication are brief: 1. That there had been substantial compliance; and 2. That the plaintiff "had substantially keep a set of books from which the loss could have been ascertained." The proper construction of the replication is, that the plaintiff had not kept a set of books, in precise and exact conformity to the requirements of the policy, but had kept books really and truly disclosing the facts from which the loss could have been ascertained. These facts could not have been disclosed, unless the books showed the purchases and sales of goods, whether for cash or on credit, and the shipments, if any were made; and if these were shown, it is difficult to perceive what more the parties could have contemplated.

This clause, now almost universally introduced into policies of insurance of merchandise kept for sale against loss by fire, has been of frequent consideration by the courts, and most usually it has not been subjected to any narrowness or closeness of construction. Legal effect has been given it for the purpose of guarding the insurer against the fraud or imposition of the insured; but it has received a fair, reasonable interpretation, so that it may not work forfeitures, or defeat the claim of the innocent insured to the indemnity promised by the policy: Liverpool etc. Ins. Co. v. Ellington, 94 Ga. 785; Western Assur. Co. v. Redding, 68 Fed. Rep. 224 708; Standard Fire Ins. Co. v. Willock (Tex. Civ. App., Nov. 28, 1894), 29 S. W. Rep. 218. In Liverpool Ins. Co. v. Ellington, 94 Ga. 785, it is said by the court: "Under the clause referred to, it was not indispensable that the books kept should embrace what is usually termed a cash-book, or that the books should be kept on any particular system. It was sufficient if the books were kept in such manner that, with the assistance of those who kept them or understood the system on which they were kept, the amount of purchases and sales could be ascertained, and cash transactions distinguished from those on credit." In Standard Fire Ins. Co. v. Willock (Tex. Civ. App.), 29 S. W. Rep. 218, the court found a "substantial compliance" with the requirements of the clause, and sustained a recovery against the insurer.

If there must be precise, exact compliance with the clause, it

would be difficult to determine and declare of what the compliance must consist. What is the degree of clearness and plainness which must be observed in the entries on the books? Is it that degree which will be satisfactory to an expert, scientific bookkeeper? If so, what system of bookkeeping must be observed? There are rival systems of bookkeeping, and the adepts in the one may regard the other as wanting in plainness and clearness. Or is it the degree which will satisfy the mind of the inquirer after the true state and condition of the business, not seeking to work, or to avoid a forfeiture of the indemnity of the policy? How many books, and of what description will constitute a set? Can it be said, or supposed, the minds of the insurer and the insured met and would have given a common answer to these inquiries? Their minds did come together on the essence and substance of this clause, when its words are looked through, that it was the duty of the insured to preserve in intelligible form, in one or more books of his own choice, written evidence of his purchases, of his sales, and of his shipments. If such evidence be preserved, the insurer is guarded against the fraud and imposition of the insured, and this is the purpose to be accomplished. There is no literal, hypercritical interpretation of the words of any contract. "In all cases, policies of insurance are liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, [225] which, in making the insurance, it was his object to secure": 1 May on Insurance, sec. 185.

The replication avers the offer of the plaintiff to produce the books, and the refusal of the defendant to receive them, thus placing the defendant in default, if it was not under the duty of demanding their production, in the event an inspection of them was desired. There was no error in overruling the demurrer to the replication.

As we interpret the tenth plea, its gravamen is, that the plaintiff did not produce the inventory of stock taken on the 1st of May, 1893, while admitting that an inventory was taken on the twenty-fifth day of December, 1893, the production of which is not negatived. The policy was issued on the eleventh day of January, 1894, and the last preceding inventory to which the clause refers is obviously that which was taken next preceding the issue of the policy. We know not any other construction or interpretation of which the words are susceptible: Liverpool etc. Ins. Co. v. Sheffy, 71 Miss. 919.

The stipulation in the policy for the examination of the in-

sured was intended for the protection and benefit of the insurer, and at his election could be modified or waived: 2 May on Insurance, sec. 464. If no notice was given the plaintiff to appear and submit to a personal examination, but notice was given her husband, and as her agent he appeared and submitted to an examination, which are the facts stated in the replication to the eleventh plea, there was a waiver of the personal examination of the plaintiff, and there was no error in overruling the demurrer to the replication.

A majority of the court are, however, of opinion, that the demurrer to the second replication to the second plea ought to have been sustained. The reasoning on which they proceed is, that the plea, after setting out the "Iron Safe Clause," averred as a breach "that the plaintiff did not keep a set of books as therein provided." The replication averred that "he had substantially kept a set of books from which the loss could have been ascertained, and averred that the plaintiff offered to produce books and evidence to meet the defendant's demand for books claimed to be necessary, but defendant refused to allow plaintiff to do so or to receive such books and proof." Under the practice which prevails in this state, [226] parties have the right to frame their pleadings, and if issue be joined upon an insufficient plea, or an insufficient replication, they are responsible for the consequences. A replication to a plea admits the legal sufficiency of the plea as a defense. Applying the rule that the pleadings must be construed most strongly against the pleader, the replication is insufficient. It avers that plaintiff "had substantially kept a set of books from which the loss could have been ascertained, and averred that the plaintiff offered to produce books and evidence to meet defendant's demand for books claimed to be necessary," et cetera. The latter clause of the replication avers that plaintiff "offered to produce books and evidence." What books? Such as the stipulation in the policy required to be kept, or what books? How much of the deficiency not furnished by the books was to be supplied by evidence, and what kind of evidence? The insufficiency of the replication, in this respect, was pointed out by the demurrer, and the demurrer should have been sustained.

For the error noted, the judgment must be reversed and the cause remanded.

INSURANCE—"IRON SAFE CLAUSE"—WARRANTY.—If the insured is ignorant of the existence of an "Iron Safe Clause" in his policy requiring him to keep his books and inventory in an iron safe at night, it is not a warranty: Goddard v. East Texas etc. Ins. Co., 67 Tex. 69; 60 Am. Rep. 1.

WILLIAMS *v.* HENDRICKS.

[115 ALABAMA, 277.]

PARTNERSHIP—TORTIOUS ACTS—PARTNER'S LIABILITY.—A partner, with respect to his common-law liability, is answerable for tortious acts done by his copartner, or by any other agent of the partnership, if authorized or adopted by the firm, or if within the scope and business of the partnership. Otherwise, it is only the partner committing the tort who is liable.

PARTNERSHIP—TORT—CUTTING TREES—PARTNER'S LIABILITY.—If one member of a partnership goes upon a person's land, and, within the scope and business of the partnership, wrongfully cuts trees on such land, this fastens upon the other partner a common-law liability to the owner of the trees for damages sustained as the consequential and natural result of the tort.

CRIMINAL LAW—STATUTORY PENALTY—LIABILITY FOR.—A person is not answerable for a statutory penalty for doing an act forbidden by statute unless he knowingly and willfully commits the wrong, or willfully and knowingly causes another to do it by his command or authority.

PARTNERSHIP—TORT—CUTTING TREES—STATUTORY PENALTY—PARTNER'S LIABILITY.—Under a statute imposing a penalty for cutting trees on another's land, without the owner's consent, a partner who goes thereon, and willfully, wrongfully, and knowingly commits such tort is the actual trespasser, and the only one against whom the statute gives the penalty. His copartner is not, therefore, answerable for such wrong, although it was done in the prosecution of the partnership business, where he had no knowledge of the tortious act until after it had been consummated.

INSTRUCTIONS—MISLEADING AND ARGUMENTATIVE—REVERSAL OF JUDGMENT.—If it is manifest that misleading or argumentative instructions probably unduly influenced the jury and thereby defeated a fair verdict, the judgment will be reversed and the cause remanded. Otherwise, the appellate court will not ordinarily reverse for such a cause.

Action brought by the appellee, L. Hendricks, against the appellant, R. J. Williams, to recover a statutory penalty for cutting trees from the plaintiff's land. The defendant's copartner, Hinton, claimed to have cut the trees by virtue of an agreement of purchase from the plaintiff. The evidence for the defendant showed that he offered to pay the plaintiff for the timber cut upon his land, the amount which Hinton said was due the plaintiff therefor, when Hinton rendered a statement of the timber which had been cut. The plaintiff obtained judgment and the defendant appealed, assigning as error, among other things, the giving of certain instructions, the nature of which sufficiently appears in the opinion.

R. L. Harmon, for the appellant.

Hubbard & Hubbard, for the appellee.

282 COLEMAN, J. Section 3296 of the code of 1886 provides that "any person who cuts down any oak on land not his own, willfully and knowingly, without the consent of the owner of the land, must pay to the owner ten dollars for every such tree," et cetera. The plaintiff, the appellee, sued to recover the statutory penalty for cutting down thirty-four oak trees. The evidence shows that the defendant and one Hinton were partners in getting staves, and, according to their agreement, the defendant furnished the money for the partnership and Hinton attended to the business of getting out the staves. He furnished to defendant at regular stated periods the amounts due parties from whom trees were purchased, and also what was due for labor, and the defendant settled the claims as thus reported. There was evidence tending to show that Hinton had no authority from defendant to cut trees on any land except by agreement and purchase from the owner, and that the trees in controversy were cut by Hinton for staves without the knowledge and consent of the defendant. One of the questions involved in the case was, whether the fact that defendant and Hinton were partners in the stave business subjected the defendant to the statutory penalty. In Story on Partnership, section 168, the following language is used: "From what has been already suggested, it is obvious that a tort committed by one partner, or by any other agent of the partnership, will not bind the partnership, unless it be either authorized or adopted by the firm, or be within the scope and business of the partnership." The general rule is, that those partners only are liable in respect of a tort who are privy to the tort; but this rule is subject to the exception that partners are responsible for the tortious acts of a partner in the prosecution of the copartnership business: Collyer on Partnership, sec. 457; 3 Kent's Commentaries, sec. 47, note. The rule is well settled, at least in this state, that the master is liable for the willful tortious acts of his servants done within the scope and range of his employment, although the particular act was not authorized by the master. The rule as here declared was at first limited to actions against railroads: Gilliam v. South etc. R. R. Co., 70 Ala. 268. But if sound as to railroads, there seems to be no good reason why it should not apply, under like circumstances, in all cases of respondeat superior, or to a partner 283 acting for and within the scope of the business: Lilley v. Fletcher, 81 Ala. 234; Alabama etc. R. R. Co. v. Frazier, 93 Ala. 45; 30 Am. St. Rep. 28; Kansas City etc. R. R. Co. v. Higdon, 94 Ala. 286; 33 Am.

St. Rep. 119. In all these cases where the principle was applied, the action sought to hold the principal or superior responsible for a common-law liability. The actions were to recover damages sustained as the consequential and natural result of the tort of the agent or servant. If, in the case at bar, the plaintiff had sued to recover the consequential damages sustained by the tortious cutting of the trees by Hinton, the partner, we would without hesitation, under the well-settled principles declared in the foregoing cases, hold that defendant was responsible for such damages resulting naturally and proximately from the tortious acts of his partner, done in the range of the partnership business. The penalty is not imposed for a mere mistake or negligence in cutting the trees. The cutting must be done knowingly and willfully. Different principles arise when it is sought to hold a principal responsible for the criminal acts of his agent or servant. The act is highly penal, and must be strictly construed; and before a party can be subjected to its penalties, it must clearly appear that he has violated it knowingly and willfully. It is not enough, in such a case, that a partner or servant, without his knowledge and contrary to instructions and against his assent, has committed the unlawful act. To so hold would be to extend the statute by judicial interpretation beyond its meaning and its positive terms: Clifton Iron Co. v. Curry, 108 Ala. 581. In the case of Patterson v. State, 21 Ala. 571, it was held that a principal was not bound, unless he authorized or co-operated in the illegal act of his clerk. In Barnett v. State, 54 Ala. 579, 587, the rule is thus declared: "A principal or a partner may be civilly liable in damages for the tort of his agent or associate, under facts which would not subject him to criminal responsibility. In a civil suit, the material inquiry is, whether the wrong was done while the agent was within the line of duty with which he was charged, or the partner within the scope of his partnership. In criminal cases, it is the participation of the principal or partner in the wrongful act, either directly by concurring therein or by assenting thereto. If the principal or partner commands, [284] procures, or expresses assent that the wrong shall be done, before or at the time of the commission, criminal responsibility may be fixed upon him": Nall v. State, 34 Ala. 262; Seibert v. State, 40 Ala. 62.

In the case of Smith v. Causey, 22 Ala. 568, the suit was to recover statutory penalty of double damages for causing an injury to stock. The court held that the statute was penal, and,

to enable a party to recover under the statute, it must be shown "that the injury to the stock of the plaintiff arose out of some act of the defendant, done, or commanded or directed to be done, by him. If this be not shown, he cannot be said, in the meaning of the statute, to cause it to be done. The mere negligence of the servant, acting in the ordinary business of the master, although the damage to the stock of the plaintiff actually results from such negligence, will not authorize a recovery." "It may often happen [continues the court] that an action on the case at common law would well lie to recover damages for the injury so done when a proceeding under the statute would not."

We find a similar ruling in the action of Cushing v. Dill, 3 Ill. 460, where the action was to recover a statutory penalty given for cutting trees, very similar to our statute. We quote from the decision as follows: "This action is brought upon a penal statute, the object of which is to punish the wrongdoer, as well as to recompense the injured individual. To subject anyone, therefore, to the penalty of the act, it must be shown to have been willfully violated, by proof that the party charged committed the forbidden act himself, or caused another to do it by his command or authority. The statute gives the penalty against the actual trespasser only; it would be a violation of legal principles, therefore, to extend it so as to embrace another by implication.

"The liability arising from the relation of master and servant is founded in policy, but the implication of authority in the servant that would render the master liable in many cases in a civil suit would not be sufficient to convict him in a criminal or penal prosecution. The maxim, Qui facit per alium facit per se, would be strictly applicable in an action of trespass against Cushing, but in this prosecution he is liable only for his personal [285] acts or such acts of his workmen or servants as are proved to have been done by his express, or, at least, necessarily implied, authority.

"There is no proof of such acts, or such authority having been given by Cushing, to those who committed the trespass; he cannot, therefore, be considered liable under the statute.

"Although Dill cannot recover in this action, he is not without a remedy for the injury sustained. That given by the statute is in addition to the remedy at common law, and an action under it would not be a bar to a suit at common law, in any result."

In the case of Satterfield v. Western Union Tel. Co., 23 Ill. App. 446, the action was brought against the telegraph company to recover the statutory penalty for trees conceded by the court to have been cut under the directions of the superintendent of the wires of the defendant. There was no evidence to show that the trees were cut under any authority, or directions of the defendant, or had been ratified by it. The court conceded the liability of the principal or master for the torts of the agent done within the scope of his authority, but held that the principle did not apply when the action was brought to recover the statutory penalty.

A statute of Massachusetts requires "that whenever persons traveling with any kind of vehicle shall meet each other upon a road or bridge, each of them shall seasonably drive his vehicle to the right of the middle," et cetera. "Every person offending against the provisions [of the act] shall for each offense forfeit a sum not exceeding twenty dollars and be further liable to any party for all damages sustained by reason of such offense." In the case of Goodhue v. Dix, 2 Gray, 181, the plaintiff sought to hold the principal or master liable, upon the ground that the servant omitted seasonably to drive to the right as provided in the statute. The court held that the employer or owner of the vehicle was not liable under the statute, "if he be in no way implicated in the conduct of the servant," and that the liability was limited to the particular individual who was guilty of its violation. The case recognized the common-law liability of the principal or employer for the acts of the agent or servant, but held the rule did not apply under the statute.

In the case of Reynolds v. Hanrahan, 100 Mass. 313, the [286] acts were very similar, if not identical, with those stated in Goodhue v. Dix, 2 Gray, 181, but the complaint was framed upon the common-law liability of the master for the acts of the servant, and not upon the statute. The court recognized the principle declared in 2 Gray, but called attention to the fact that in the one case the action was under the statute, and in the case at bar the action was upon the common-law liability of the defendant. In the latter case the defendant was held liable for the acts of the servant, while under the statute the liability was limited to the particular person who violated it.

We think it is clear that the authorities make a broad distinction as to the liability of a principal or master, where it is sought to hold him responsible upon a common-law liability for

the torts of the agent or servant, and when it is sought to recover from him a statutory penalty. In the former cases, he is liable for the acts done within the scope of his employment. In the latter, the liability is fixed and limited by the statute itself. The distinction is clear, and rests upon sound principles of law.

What was said in the case of Postal Tel. Co. v. Brantley, 107 Ala. 683, and Postal Tel. Co. v. Lenoir, 107 Ala. 640, is wholly correct when applied to the common-law action for the recovery of damages. A decision of the question now considered was not before the court in either of those cases, and what was said with reference to the liability of a principal for the statutory penalty was merely dictum. We have been referred to the case of Renfro v. Adams, 62 Ala. 302, where the action was for the recovery of the penalty imposed for a failure to enter satisfaction of a mortgage under section 2223 of the code of 1876. We approve of all that was said and decided in that case. The mortgage was executed to the partnership as a unit, and the action was against the partnership as a unit. The statute imposed the penalty upon "any mortgagee who failed to enter satisfaction after notice by the mortgagor." The duty was imposed upon the partnership as mortgagee. The question was, whether notice to one partner was notice to the partnership. We do not doubt that it was correctly held to be sufficient. Under the one act, mere negligence or failure to act incurs the penalty. In the other, an affirmative act knowingly and willfully done is necessary.

287 This court will not ordinarily reverse a cause because of giving instructions to the jury which are merely misleading or argumentative, though it is better that such charges be refused. But when it is manifest that misleading and argumentative charges given were of such a character as to have probably unduly influenced the jury, and thereby probably defeated a fair verdict, it becomes the duty of the court to reverse and remand the cause. Charges numbered 2, 4, and 7 were objectionable, in singling out and giving undue prominence to the fact of the partnership. Charge 7 was not only an argument throughout, but, under the facts of the case, highly injurious to the defendant. This charge utterly ignored that part of the evidence which showed that Hinton claimed to have cut the rees by virtue of an agreement of purchase from plaintiff, and so reported to the defendant, and that the offer to pay may have proceeded from the representation or statement of Hinton.

Reversed and remanded.

INSTRUCTIONS.—CONFLICTING AND MISLEADING INSTRUCTIONS are good ground for a reversal of judgment, though the correct rule is announced in one part of the charge. Such instructions should be refused: Carson v. Stevens, 40 Neb. 112; 42 Am. St. Rep. 661; Perot v. Cooper, 17 Colo. 80; 31 Am. St. Rep. 258; Louisville etc. R. R. Co. v. Hall, 87 Ala. 708; 13 Am. St. Rep. 84.

Liability of One Partner for the Tortious Acts of the Other.

Acts within Scope of Partnership Business.—The tort of one partner, committed in the transaction of the ordinary business of the partnership, is the tort of all the partners, and each partner, being liable individually for such a tort, may be sued alone, or with part or all of the other partners. The tort of one partner, where it is connected with the business of the firm, and incident to it as the business is carried on, is considered the joint and several tort of all, and the partner doing the act is considered as the agent of the other partners. Otherwise expressed, each partner is the agent of the firm while engaged in the prosecution of the partnership business, and the firm is answerable for the torts of each, if committed within the scope of his agency, although the firm is ignorant of his acts, for, as has been justly observed, "by forming the connection of partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns": Story on Partnership, sec. 108; Tucker v. Cole, 54 Wis. 539; Liebold v. Green, 69 Ill. App. 527; Dudley v. Love, 60 Mo. App. 420; Schwabacker v. Riddle, 84 Ill. 517; Wiley v. Stewart, 122 Ill. 545; Durant v. Rogers, 87 Ill. 508; Stockton v. Frey, 4 Gill, 406; 45 Am. Dec. 138; Hess v. Lowrey, 122 Ind. 225; 17 Am. St. Rep. 355; Hobbs v. Chicago Packing etc. Co., 98 Ga. 576; 58 Am. St. Rep. 320; Heirn v. McCaughan, 32 Miss. 17; 66 Am. Dec. 588; United States v. Baxter, 46 Fed. Rep. 350; Kuhn v. Weil, 73 Mo. 213; Chambers v. Clearwater, 1 Abb. App. Dec. 341; Mode v. Penland, 93 N. C. 292; Whittaker v. Collins, 34 Minn. 299; 57 Am. Rep. 55; Hyrne v. Erwin, 23 S. C. 226; 55 Am. Rep. 15, and note; Haney Mfg. Co. v. Perkins, 78 Mich. 1, 9; Atlantic Glass Co. v. Paulk, 83 Ala. 404; Lothrop v. Adams, 133 Mass. 471; 43 Am. Rep. 528; McClure v. Hill, 36 Ark. 268; Loomis v. Barker, 69 Ill. 360; Robinson v. Goings, 63 Miss. 500; Pierce v. Wood, 23 N. H. 519; Champion v. Bostwick, 18 Wend. 175; 31 Am. Dec. 376; Hall v. Younts, 87 N. C. 285; Gerhardt v. Swaty, 57 Wis. 24; Fletcher v. Ingram, 46 Wis. 191.

Thus, if staves are made from timber cut upon the plaintiff's land, without his authority, and upon the direction of one of two partners, and the staves come into the possession of the partners and are converted by them to their own use, both partners are answerable for the trespass where notice was given to one partner, though the other had no knowledge of the wrong, for notice to one partner binds all: Tucker v. Cole, 54 Wis. 539. So, if a member of a firm, within the scope of the partnership business, commits a tort or wrongful act, by seizing and taking the property of an-

other, and it is appropriated to the use and benefit of the firm, augmenting its assets, the other partners are answerable: Robinson v. Goings, 63 Miss. 500; Durant v. Rogers, 87 Ill. 508. If trespass, by cutting timber on public lands, is committed by a firm, one partner cannot show that, as to him, it was done by mistake, though his copartner may not have been mistaken, and ask that one judgment for damages be rendered against him and a different one against his partner. If the innocent partner holds the fruits of the wrong after being notified of the mistake, he thereby ratifies his partner's act: United States v. Baxter, 46 Fed. Rep. 350. A principal incurs liability in tort, as well as in contract, by ratifying the acts of his agent: Morehouse v. Northrop, 33 Conn. 380; 89 Am. Dec. 211.

If the wrongful delivery of the goods of a third person, while in the custody of a partnership, is an act done within the scope of the partnership business, it, though made by a single member of the firm, without the knowledge or consent of the other members of the firm, renders all of the copartners or the firm answerable in trover for a conversion of the goods: Hobbs v. Chicago Packing etc. Co., 98 Ga. 576; 58 Am. St. Rep. 320. So, if one partner, in a matter connected with the business of the partnership, does an act to the injury of a third person, which is merely a tort by construction or inference of law merely, his copartner is equally answerable with him for the consequences of the act: Myers v. Gilbert, 18 Ala. 467. All the members of a firm are presumptively answerable for a trespass committed by one member thereof in causing a writ of attachment or execution to be levied, in a suit to recover a partnership debt, if the levy, in either case, is wrongful: Kuhn v. Well, 73 Mo. 213; Gurler v. Wood, 16 N. H. 539; Chambers v. Clearwater, 1 Abb. App. Dec. 341. All the members of a firm of physicians are answerable for the malpractice of any one of them: Whittaker v. Collins, 34 Minn. 299; 57 Am. Rep. 55; Hyrne v. Erwin, 23 S. C. 226; 55 Am. Rep. 15. If, in the course of the partnership business, a member of the firm injures the business of another by slander, as where the purpose of the words spoken is to aid the firm business by preventing another from making sales of an article which the firm is at the time selling, the partnership is answerable therefor, just as it might be for any other tort by any other agent: Haney Mfg. Co. v. Perkins, 78 Mich. 1, 9. So, an action for a libel may be maintained against a firm, where the wrong was done by all the partners, or by one in the prosecution of the partnership business: Atlantic Glass Co. v. Paulk, 83 Ala. 404; Lothrop v. Adams, 133 Mass. 471; 43 Am. Rep. 528. A person may be liable for a trespass upon land, committed by his partner, for the benefit of the partnership, and of which he shares the benefit, although he himself never went upon the ground: Gerhardt v. Swaty, 57 Wis. 24.

Acts without the Scope of the Partnership Business.—A tort committed by one partner will not bind the partnership or the other copartners unless it be authorized or adopted by the firm or be within the proper scope and business of the partnership: Taylor v.

Jones, 42 N. H. 25; Graham v. Meyer, 4 Blatchf. 129. Hence, if a partner commits a tort, not as a partner but as an individual, in respect to a matter entirely foreign to the business of the partnership, the other partners are not answerable for his wrong: Schwabacker v. Riddle, 84 Ill. 517; Durant v. Rogers, 71 Ill. 121; Graham v. Meyer, 4 Blatchf. 129; Heirn v. McCaughan, 32 Miss. 17; 66 Am. Dec. 588; Rosenkrans v. Barker, 115 Ill. 331; 56 Am. Rep. 169; Kirk v. Garrett, 84 Md. 383; Marks v. Hastings, 101 Ala. 165, 175; Grund v. Van Vleck, 69 Ill. 478; Titcomb v. James, 57 Ill. App. 296; Van Voorhis v. Brown, 29 App. Div. (N. Y.) 119; Stokes v. Burney, 3 Tex. Civ. App. 219; Abraham v. Hall, 59 Ala. 386; Gwynn v. Duffield, 66 Iowa, 708; 55 Am. Rep. 286.

Thus, a partner is not answerable for the trespass of his copartner in wrongfully taking and carrying away the property of a third person, or other wrongful act, committed by the latter without the former's knowledge or assent, and without the scope of the partnership business, especially when there is no proof that he ratified the same by sharing in the fruits of the wrong: Durant v. Rogers, 71 Ill. 121; but if there is proof which shows, or even tends to show, that the property seized and carried away was appropriated to the benefit of the firm, this would fix the liability of such partner: Durant v. Rogers, 87 Ill. 508. If property is conveyed to a firm composed of two persons, to secure a usurious loan of money made by one of the partners, without the other's knowledge, and the loan is made in a state where such loan and conveyance are void by its laws, the transaction cannot be regarded as within the scope and business of the partnership so as to make the ignorant partner answerable, in tort, for the other's violation of law. To make him liable, it must appear that he authorized or ratified the transaction: Graham v. Meyer, 4 Blatchf. 129. If one partner maliciously prosecutes a person for stealing partnership property, the other members of the firm are not answerable unless they are, in fact, privy to the malicious prosecution: Titcomb v. James, 57 Ill. App. 296, 307, and authorities there cited. One partner is not liable to an action for a malicious prosecution for the arrest of a person by his copartner on a charge of larceny from the firm, unless he advised or participated in the arrest. A mere "knowledge and consent" on his part that the arrest should be made will not render him liable: Gilbert v. Emmons, 42 Ill. 143; 89 Am. Dec. 412. If one member of a firm orders the arrest and imprisonment of a person charged with larceny of the firm's property, another partner who knew nothing about the matter beforehand, and who did not afterward ratify it, is not answerable in an action for false imprisonment: Kirk v. Garrett, 84 Md. 383. A prosecution for larceny for goods stolen from the firm is not within the scope of a mercantile partnership. Hence, one partner cannot be made answerable for the arrest or prosecution of a person by a copartner, on a charge of stealing partnership property, unless he advises, directs, or participates therein, and even then, it has been held, he is liable only in his individual capacity: Marks v. Hastings, 101 Ala. 165, 175. One partner cannot involve another in a trespass unless in the ordinary

course of their business, and in a case where the trespass is in the nature of a taking which is available to the partnership; and, in such a case, to render the partner liable, who did not join in the commission of the trespass, he must afterward, according to some authorities, have concurred and received the benefit of it. Furthermore, the subsequent approval of a trespass by a third person does not render him answerable unless the act was originally done in his name or for his use. From these principles, it follows that, if a member of a partnership, which firm acts as agents for the owner of demised property, commits a trespass in expelling the tenant and removing his goods from the premises, the other partner, who took no part in the act and knew nothing of it at the time, and neither advised nor directed it, is not answerable merely because he subsequently approved and sanctioned the act after its commission: Grund v. Van Vleck, 69 Ill. 478. If a partnership holds a chattel mortgage upon the goods of a person who is in default, the firm has a right to take possession of the mortgaged property, if it can be done peaceably, but one member of the firm is not liable for the tort or trespass of another in taking possession of the property, committed without his knowledge or consent: Titcomb v. James, 57 Ill. App. 296. Another well-settled general principle of the law of partnership is, that a note given by one partner in the firm name in payment of his individual debt cannot be enforced against the firm by one taking the note with full knowledge of the facts. Hence, if a partner, who is a postmaster, gives a note in the name of his firm to secure a loan made to him by the payee, to enable such partner to replace government money which he has wrongfully and criminally appropriated to the payment of a partnership debt without the knowledge of his copartners, the payee cannot enforce the note against the maker's copartners, for the transaction is not within the scope of the partnership business, but is entirely distinct therefrom, though the firm may, in a certain sense, profit thereby. However this may be, the fact remains that the obligation to restore the money thus appropriated by the partner is purely a personal one: Van Voorhis v. Brown, 29 N. Y. App. Div. 119, 121. If one member of a firm purchases cotton, which is liable for rent, and such purchase is not made for the firm, but for himself alone, and the cotton is converted to his own use, the other partner is not answerable where he had nothing to do with its conversion and received none of its proceeds: Stokes v. Burney, 3 Tex. Civ. App. 219.

Negligence.—All the members of a partnership are answerable for an injury occasioned by the negligence of one of the firm while transacting its business: Linton v. Hurley, 14 Gray, 191. If physicians are in partnership, all are answerable in damages for the professional negligence or malpractice of any one of them: Hyrne v. Erwin, 23 S. C. 226; 55 Am. Rep. 15; Whittaker v. Collins, 34 Minn. 299; 57 Am. Rep. 55; Hess v. Lowrey, 122 Ind. 225; 17 Am. St. Rep. 355. So, if a horse is borrowed by one member of a firm, to be used in and about the partnership business, and is lost by his negligence or other wrongful act, the firm is answerable to

the owner for the loss or conversion: Witcher v. Brewer, 49 Ala. 119. And if one member of a firm of butchers, in furtherance of the partnership business, and for its benefit, puts poisoned meat outside of a slaughterhouse, but negligently places it where dogs might be expected to get it, the partnership is answerable to the owner of a dog which dies from eating such meat: Dudley v. Love, 60 Mo. App. 420. But where one member of a firm of apothecaries negligently permitted a customer to help himself to a dose of medicine without paying for it, and by mistake he took poison instead of what he intended to take, it was held that giving away medicines was not a part of the firm's business, and that the innocent copartner was not, therefore, answerable for the result: Gwynn v. Duffield, 66 Iowa, 708; 55 Am. Rep. 286. If partners are jointly liable as wrongdoers, an action will lie against one of them, who may be made answerable for the negligent act of the firm's agent: Wood v. Luscomb, 23 Wis. 287; White v. Smith, 12 Rich. 595.

Conversion, Generally.—A firm may be held answerable in trover for a conversion by one partner. It is not necessary that there should be a joint conversion, in fact, in order to implicate all the partners, as such a conversion may arise by construction of law. A joint conversion may be implied, in law, by consent of a partner to the acts of his copartners. An assent by some of the partners to a conversion by the others will make them wrongdoers equally with the rest, if the conversion was for their use and benefit, and they were in a situation to have originally commanded the conversion; and one partner's conversion of property which has been delivered to him for purposes connected with the business of the firm, is deemed to be the act of the firm, unless repudiated by the other partners: Loomis v. Barker, 69 Ill. 360; Bane v. Detrick, 52 Ill. 19, 28; Nisbet v. Patton, 4 Rawle, 120; 26 Am. Dec. 122; Head v. Goodwin, 37 Me. 181; McCrillis v. Hawes, 38 Me. 566; Fletcher v. Ingram, 46 Wis. 191; Witcher v. Brewer, 49 Ala. 119; Hall v. Younts, 87 N. C. 285. Thus, trover will lie for property taken under a void attachment, not only against the constable who seized it, but against the members of a firm, who were creditors of the owner and sold the property under execution, where one of them ordered the property to be seized, but refused to give it up on demand of the owner, while the other declined to do anything about it, but referred the owner to his partner. The principle which controls in such a case is that whatever one partner does in the collection of a firm debt is presumptively done with the sanction of the other: Rolfe v. Dudley, 58 Mich. 208; Harvey v. McAdams, 32 Mich. 472. So if one partner places a claim in the hands of a constable for collection, and the property of a stranger is sold under attachment or execution, in his effort to collect the claim, both partners are answerable to the owner, in trover, for the conversion, where the other partner was present at the sale, bid on the property, and treated and spoke of it as having taken and sold on the process issued upon the claim due the firm, particularly where he received the proceeds of the sale as a payment on such claim: Loomis v. Barker, 69 Ill. 360. And two partners must be considered as

having acted as one for their joint benefit, and are jointly liable in trover, where one goes to a distant place, and, to secure a claim due the firm, takes possession of a man's store in his absence, and sells the goods therein, if the other partner remains at home, though he promised to go there, and credits the proceeds of the goods, on account of the firm, to the debtor, particularly where, upon the return of his partner, and upon being informed of what has taken place, he approves of his partner's conduct and in nowise dissents therefrom: Bane v. Detrick, 52 Ill. 19, 23. If property is wrongfully taken by partners and sold, a subsequent settlement with the owner for one-half by one, is no defense, in an action against the other for the remaining value: McCrillis v. Hawes, 38 Me. 566. If a commercial firm wrongfully converts the property of a decedent's estate, the members thereof are answerable in solido: Birdsall v. Bemiss, 2 La. Ann. 449. The refusal, by one partner, to deliver goods upon demand, which have been received by the firm as bailees is evidence of a conversion by all the partners: Holbrook v. Wight, 24 Wend. 169; 35 Am. Dec. 607; and if the members of a firm are sued as individuals for the conversion of plaintiff's property, evidence of transactions with the firm in respect to it, and of the membership thereof, is competent to affect them: Hall v. Younts, 87 N. C. 285.

Misapplication of Moneys or Property.—If one member of a firm appropriates or misapplies moneys or property in its custody, within the scope of its business, or in the custody of such partner as a representative of the firm, such act will make each partner answerable to the owner for such conversion: Jackson v. Todd, 56 Ind. 406; Pundmann v. Schoenich, 144 Mo. 149; Ex parte Biddulph, 3 De Gex & S. 587; and this rule applies to law partnerships: Harman v. Davey, 2 El. & B. 61; St. Aubyn v. Smart, L. R. 3 Ch. App. 646; Rhodes v. Moules [1895], 1 Ch. 236; Plummer v. Gregory, L. R. 18 Eq. 621; In re Ketchum, 1 Fed. Rep. 815; Cleather v. Twisden, L. R. 24 Ch. Div. 731; Eager v. Barnes, 31 Beav. 579; Willet v. Chambers, Cowp. 814; Fornes v. Wright, 91 Iowa, 392, 395; McGill v. McGill, 2 Met. (Ky.) 258. Hence, if the treasurer of a city deposits its funds in banks, in the name of a firm of which he is the manager, or commingles them with money in the firm's drawer, and they are paid out by checks drawn in the name of the firm, the result is a conversion by the firm of the city's money, particularly where the other members of the partnership have knowledge of the facts. Such funds are, therefore, trust funds in the hands of the firm, and all the property of the firm is chargeable with their amount: Pundmann v. Schoenich, 144 Mo. 149. So if the active member of a firm engaged in making sales to a railroad, for which it receives its pay from the state, defrauds the state out of a large sum by duplicate bills and bogus accounts, the innocent partner is answerable: Alexander v. State, 56 Ga. 478. So if one member of a firm of attorneys doing a collection business collects money from a client and absconds with it, his partner is answerable: Dwight v. Simon, 4 La. Ann. 490.

The mere collection of money, it is true, is not professional busi-

ness, nor does its performance require the exercise of legal skill; but if attorneys at law, being members of a firm, undertake business of this kind, the undertaking involves the same liabilities that are incurred by ordinary partnerships, and each member of the firm continues bound for the performance of all the partnership undertakings begun but not completed prior to a dissolution of the firm; and if the dissolution results from the death of one of the partners, his estate still continues answerable for their performance, as where one of the partners of a firm of lawyers died before moneys collected for clients by the firm were paid over: McGill v. McGill, 2 Met. (Ky.) 258, 263, per Simpson, C. J. There are also many other things an attorney may do, and which the law does not enjoin upon him as a duty, yet they are within the scope of his business. Hence, while the furnishing of a surety on an attachment bond, and the receiving of money to indemnify such surety, is not a duty enjoined upon a firm of lawyers, and is not an absolute necessity to the carrying on of the partnership business, still such acts are proper to be done in furtherance of a client's interest, and, when so done, all of the members of the firm, whether cognizant of the facts or not, are bound by the individual act of a partner, done in the firm name, and in furtherance of its interests: Fornes v. Wright, 91 Iowa, 392, 395. An innocent partner's liability for the tort or wrong of a copartner in appropriating or misapplying moneys or property has sometimes been made to depend, apparently, upon his want of knowledge, at the time of the transaction: Bishop v. Countess of Jersey, 2 Drew. 143; but, where money or property in the custody of one member of a firm is appropriated or misapplied by him, it is immaterial whether the other partners knew anything about it or not: Cleather v. Twisden, L. R. 24 Ch. Div. 731; Dwight v. Simon, 4 La. Ann. 490; Alexander v. State, 56 Ga. 478; Brydges v. Branfill, 12 Sim. 369; Blair v. Bromley, 2 Phill. Ch. 354; for it has been justly observed that "one can hardly see what the knowledge or means of knowledge has to do with it, if covered by the scope of the business."

On the other hand, if money or property comes into the hands of a partner in the course of some transaction unconnected with the firm business, his appropriation or misapplication thereof will not affect his innocent copartners, where the firm does not receive the benefit of the wrong: Alexander v. State, 56 Ga. 478; Adams v. Sturges, 55 Ill. 468; Ex parte Eyre, 1 Phill. Ch. 227; Coomer v. Bromley, 5 De Gex & S. 532; Dounce v. Parsons, 45 N. Y. 180. Thus, if a promissory note is delivered to one member of a firm, as collecting agent, his refusal to redeliver the note does not make his copartners answerable for the amount thereof: Linn v. Ross, 16 N. J. L. 55.

Misuse of Trust Funds.—It has been held that, if one member of a firm uses trust moneys of a third person in the business of the partnership, and commingles them with those of the firm, a partnership liability is created, and the firm is answerable therefor, even where such trust moneys were so used without the knowledge of the other partners: Welker v. Wallace, 31 Ga. 362; Palmer v. Scott,

68 Ala. 380. But this rigid rule is not the prevailing one. The doctrine supported by the weight of authority is, as laid down in Englar v. Offutt, 70 Md. 78, 14 Am. St. Rep. 332, that "if a partner, being a trustee or fiduciary, improperly employs the money of his cestui que trust in the partnership business, or in the payment of partnership debts, this fact alone, and without anything more, is not sufficient to entitle the cestui que trust to occupy the position of creditor, and to enforce repayment of his money as against the firm. To render the firm liable in such case, the firm itself must be shown to have been implicated in the breach of trust; and this cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it."

As supporting this rule, see Ex parte Apsey, 3 Bro. C. C. 265; Willett v. Stringer, 17 Abb. Pr. 152; Tallmadge v. Penoyer, 35 Barb. 120; Logan v. Bond, 13 Ga. 192; Edwards v. Parker, 88 Ala. 356; Gilruth v. Decell, 72 Miss. 232. Compare Harper v. Lamping, 33 Cal. 641; Jaques v. Marquand, 6 Cow. 497.

"But if the other partners have knowledge of such misuse of trust money, and know that such money is being employed in the partnership business for common benefit, they will all be bound for the money so employed, and be made answerable for the breach of trust committed by their copartner, with their acquiescence": Englar v. Offutt, 70 Md. 78; 14 Am. St. Rep. 332; Trull v. Trull, 13 Allen, 407; Wharton v. Clements, 3 Del. Ch. 209; Price v. Mulford, 36 Hun. 247; Hutchinson v. Smith, 7 Paige, 26; Guillou v. Peterson, 89 Pa. St. 163; Davis v. Gelhaus, 44 Ohio St. 69; Stoddard v. Smith, 11 Ohio St. 581; In re Jordan, 2 Fed. Rep. 319; Cunningham v. Woodbridge, 76 Ga. 302; Ryan v. Morrill, 83 Ky. 352; Travis v. Milne, 9 Hare, 141; Hollemback v. More, 12 Jones & S. 107, 114; Jaques v. Marquand, 6 Cow. 497; Houser v. Riley, 45 Ga. 126; In re Ketchum, 1 Fed. Rep. 815. Contra, Evans v. Biddleman, 3 Cal. 435, holding that an unauthorized loan, by a partner, of a third person's money, to the firm can only be regarded as an advance by one partner to the partnership concern, for which the partners are liable to him, and that the wrongdoing partner alone is answerable to such third person. It has also been held in England that those partners only who are cognizant of the misapplication of the trust fund are chargeable: Vyse v. Foster, L. R. 7 H. L. App. Cas. 318, 335. The ground of liability in such cases, when incurred, is joint and several: Liquidation etc. Assn. v. Coleman, L. R. 6 H. L. App. Cas. 189, 203; Brydges v. Branfill, 12 Sim. 369; In re Jordan, 2 Fed. Rep. 319. The misuse of a trust fund before one is admitted into a firm does not make him answerable: Twyford v. Traile, 7 Sim. 92; but if a partner misuses trust funds without the knowledge of his copartners, and he subsequently gives a firm note for the amount, with their knowledge, the firm must pay it, particularly where it received the benefit: Palmer v. Scott, 68 Ala. 380; Richardson v. French, 4 Met. 577. After the dissolution of a partnership one member of the firm is not answerable for the misuse of a third person's money by his copartner, when he himself has derived no

advantage from its use, nor ratified the act of his partner in using it: Dunlap v. Limes, 49 Iowa, 177. Compare Edwards v. Parker, 88 Ala. 356. One partner's use of a trust fund in paying his share of the capital of the partnership, without participation or knowledge of his copartner, does not create a trust on the firm assets in favor of the cestui que trust, for the guilty partner's knowledge in such a case is not the knowledge of the firm: Gilruth v. Decell, 72 Miss. 232. If an administrator, who is a member of a firm, uses the funds of the estate in the firm business, with the knowledge of his copartners, the firm and its members are jointly and severally liable for such funds: In re Jordan, 2 Fed. Rep. 319. Compare Travis v. Milne, 9 Hare, 141. So if a firm borrows money of a recusant trustee, who is a member thereof, it is answerable for such trust fund: Ryan v. Morrill, 83 Ky. 352.

Fraud and Misrepresentation.—It is thoroughly settled that a partnership is bound for a fraud or deceit committed by one partner in the course of the transactions and business of the firm, even when the other partners have not the slightest connection with, or knowledge of, or participation in such fraud or deceit: Chester v. Dickerson, 54 N. Y. 1; 13 Am. Rep. 550; Wolf v. Mills, 56 Ill. 360; Wilson-Obear Grocery Co. v. Cole, 26 Mo. App. 5; Morehouse v. Northrup, 33 Conn. 380; 89 Am. Dec. 211; Locke v. Stearns, 1 Met. 560; 35 Am. Dec. 382; Moorehead v. Gilmore, 77 Pa. St. 118; 18 Am. Rep. 435; Randall v. Knevals, 27 N. Y. App. Div. 146, 154; Guillou v. Peterson, 89 Pa. St. 163; Durant v. Rogers, 87 Ill. 508; Kilgore v. Bruce, 166 Mass. 136, 140; Brydges v. Branfill, 12 Sim. 369; note to Pierce v. Jackson, 6 Mass. 242, 245; Hammond v. Heward, 11 U. C. C. P. 261; Blair v. Bromley, 5 Hare, 541; Wallace v. James, 5 Grant U. C. 163; Manufacturers' etc. Bank v. Gore, 15 Mass. 75; 8 Am. Dec. 83; Boardman v. Gore, 15 Mass. 331; and receive no benefit therefrom: Hawkins v. Appleby, 2 Sand. 421; Blair v. Bromley, 2 Phill. Ch. 354. Particularly is this true where the other partners have knowledge of the fraud and share in its fruits: Jacobs v. Shorey, 48 N. H. 100; 97 Am. Dec. 586; Durst v. Burton, 47 N. Y. 167; 7 Am. Rep. 428; Sherman v. Smith, 42 How. Pr. 198; Davis v. Gelhaus, 44 Ohio St. 69; Castle v. Bullard, 23 How. 172, 189; St. Aubyn v. Smart, L. R. 3 Ch. App. 646: Stockwell v. United States, 13 Wall. 531; and the statute of frauds presents no obstacle to relief: Chester v. Dickerson, 54 N. Y. 1; 13 Am. Rep. 550. Thus the acts of one partner in effecting a fraudulent purchase of lands at a sheriff's sale is binding on all the partners: Blight v. Tobin, 7 T. B. Mon. 612; 18 Am. Dec. 219. So a partner is answerable for money procured by his copartner from a bank on a forged indorsement, and placed to the credit of the firm: Manufacturers' Bank v. Gore, 15 Mass. 75; 8 Am. Dec. 83. And if a firm is indebted, and one member of it enters into a collusive and fraudulent scheme with a third person to defraud the other partner and the creditor, by having delivered to such third person goods which it was arranged should be manufactured by the firm, shipped to the creditor, and sold in satisfaction of its debt, the defrauded partner may maintain an action

for the creditor's use, against such third person, for the goods thus converted, or their value: Poe v. Ellis, 99 Ga. 235. A firm is also answerable for an act prohibited by law, committed by one of its members in the course of the partnership business, although the other partners had no knowledge of it, as where he made a contract with another, in the course of the firm business, and in its name, for trading for a commission on the board of trade, which was illegal, as relating to option or gaming contracts: Tenney v. Foote, 95 Ill. 99.

If goods are fraudulently obtained for the firm by one partner, and by him fraudulently disposed of, the other members are jointly liable for the fraud: Banner v. Schlessinger, 109 Mich. 262. A partner who receives and participates in the use or sale of goods obtained by the fraud of a copartner will be held to have adopted the fraudulent act, and will be placed in the same situation in reference to the rights of vendors of the goods, as if he had directed his copartner to procure them, or had originally concurred with him in the transaction: Jacobs v. Shorey, 48 N. H. 100; 97 Am. Dec. 586. But in Sherwood v. Marwick, 5 Me. 295, it is held that one partner cannot render another liable for his fraud, without an actual participation. One partner cannot maintain trespass against a purchaser from his copartner of all the partnership goods, though the sale was made in fraud of his rights: Wells v. Mitchell, 1 Ired. 484; 35 Am. Dec. 757.

And this rule, making a partner liable for the fraud of his copartner, applies to false or fraudulent representations, by one partner, in the course of the partnership business and transactions. They will bind the firm and create a liability coextensive therewith, for each partner is the agent and representative of the firm with reference to all business within the scope of the partnership. The rule is thus stated by the supreme court of the United States: "If, in the conduct of the partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business": Strang v. Bradner, 114 U. S. 555, 561; affirming Bradner v. Strang, 89 N. Y. 300. The following authorities also support this rule: Peckham Iron Co. v. Harper, 41 Ohio St. 100; Patten v. Gurney, 17 Mass. 182; 9 Am. Dec. 141; Morgan v. Skidmore, 55 Barb. 263; Sweet v. Bradley, 24 Barb. 549; Blair v. Bromley, 2 Phill. Ch. 354; Rapp v. Latham, 2 Barn. & Ald. 795.

Thus, if one partner, while acting for the firm, makes an exchange of lands by means of false representations, his copartners are answerable for the fraud, though they took no part in the transaction and were ignorant of the fraud: Stanhope v. Swafford, 80 Iowa, 45. Every partner is answerable for the fraudulent representations of

every other member of his firm made in the sale of partnership property as a means of effecting such sale: Brundage v. Mellon, 5 N. Dak. 72. So, if one of a firm of warehousemen falsely represents to a person who advances money on the faith of such representation that he has on storage with the firm a certain quantity of grain, the innocent partners are bound by such representation, and by the firm receipts, given by the former for such money, and liable therefor, upon the ground that if an agent or partner makes a representation of a fact outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, upon the faith of which another acts, the principal or firm is precluded from controverting the fact so alleged: Griswold v. Haven, 25 N. Y. 595; 82 Am. Dec. 380. The members of a firm are answerable for a false warranty made by one of such members, in a sale of partnership property, within the scope of his authority: Morehouse v. Northup, 33 Conn. 380; 89 Am. Dec. 211. And where the members of a firm, under their firm name, organize a corporation, each partner is answerable for the misrepresentations and concealments of the others committed while engaged in promoting the enterprise: Walker v. Anglo-American etc. Trust Co., 72 Hun, 334. In Stewart v. Levy, 36 Cal. 159, 165, it is said: "All the partners will be bound by the fraud of one of the partners in contracts relating to the partnership made with innocent third parties. That is to say, all are responsible for the injury occasioned by the fraud, and are liable to an action brought upon the contract, or for the recovery of the property fraudulently obtained, whether they were cognizant of the fraud or not. The rule is the same as it is in respect to the responsibility of the principal for the fraud of his agent, while acting within the scope of his authority; and, indeed, a partner becomes liable for the fraud of his copartner, because of the relation each bears to the other of agent in the partnership business. But such responsibility is essentially different from a liability to a judgment for fraud, upon an issue joined as in this case. The fraud upon which the judgment proceeds is actual, intentional fraud, and implies moral turpitude. It needs no argument to prove that one partner cannot be adjudged to be guilty of a fraud of that character, committed without his knowledge or assent, and which he neither assents to nor ratifies by adopting the act of his copartner, with knowledge of his fraud." But that one partner is liable to arrest for the fraud of his copartner in contracting a debt, see Townsend v. Bogart, 11 Abb. Pr. 355; Sherman v. Smith, 42 How. Pr. 198. Contra, McNeely v. Haynes, 76 N. C. 122.

On the other hand, it is a principle of the law of agency that if an agent commits an independent fraud for his own benefit, he ceases to act as an agent for his principal, and, as it is essential to the very existence or possibility of the fraud that he should conceal the real facts from the latter, the ordinary presumption of a communication between them fails. To the contrary, the presumption is that no communication was made, and consequently the principal is not affected with constructive notice: Bienenstok v. Ammidown, 155 N. Y. 47, 60, per Gray, J. Hence, as the principle of

agency applies to copartners, it is only when it can be seen that a partner is, in fact, acting as an agent for copartners that he binds them. In Bienenstok v. Ammidown, 155 N. Y. 47, Ammidown, the president of an insolvent manufacturing company, was a member of a firm of commission merchants. The manufacturing company was indebted to his firm for advances on goods consigned for sale. Ammidown obtained a loan from a bank for the manufacturing company, upon the pledge, through warehouse receipts, of unmanufactured material, which had been fraudulently obtained by the company from the vendors, and deposited the proceeds to the credit of the manufacturing company with his firm. The firm had no interest in or liability for the deposit other than to pay it out to the company when drawn upon, but Ammidown did have proprietary interests in the manufacturing company to the extent of owning about ninety per cent of its capital stock. The deposit was soon drawn out by the manufacturing company, and the vendors of the pledged property brought an action to recover the proceeds thereof from the firm. Under these circumstances, it was considered that Ammidown's situation was one so personal in its nature as to remove every support from the proposition that he was at any time acting within the scope of his agency as a member of the firm. It was, therefore, held that in the whole transaction preceding and including the deposit with his firm he acted as the agent of the manufacturing company and for his own personal benefit as a stockholder therein, and not as the agent of his firm; and that his knowledge of the fraud, so acquired, was not imputable to his copartner, and did not make the latter answerable to the company's vendors: Bienenstok v. Ammidown, 155 N. Y. 47, 60, reversing the same case, 31 Abb. N. C. 400.

Other cases hold that if a partner commits a fraud, not as a partner, but as an individual, in respect to a matter foreign to the business of the partnership, the other partners are not answerable: Schwabacker v. Riddle, 84 Ill. 517; Gray v. Cropper, 1 Allen, 337; Loftus v. Ivy, 14 Tex. Civ. App. 701; Alexander v. State, 56 Ga. 478; Andrews v. De Forest, 22 N. Y. App. Div. 132. Thus, a firm is not answerable for money fraudulently obtained from the state by one of its members, in a matter having no connection with the ordinary business of the partnership, and from which it receives no benefit: Alexander v. State, 56 Ga. 478. A settlement between a partnership debtor and one of the firm, made collusively in fraud of the other partners, is not binding on the firm whether or not such partner had authority to collect the debt: Loftus v. Ivy, 14 Tex. Civ. App. 701. A fraud committed by a partner while acting on his own separate account is not imputable to the firm, although, had he not been connected with the firm, he would not have been in a position to commit the fraud: Andrews v. De Forest, 22 N. Y. App. Div. 132, 138, holding that a firm of attorneys at law is not answerable for the acts of one member of the firm who is the attorney in fact of a client. So, if one member of a firm prevails upon a third person, by fraudulent representations, to buy the interest of his copartners in the business, those who sell are not answerable for

such fraudulent representations, unless they instigated or approve them, or the guilty partner acted as their agent in making the sale, as the mere fact of their relation as partners does not make them liable: Schwabacker v. Riddle, 84 Ill. 517.

Crimes—Criminal Liability.—As a general rule, one partner is not liable for the willful tort of a copartner, and acts or omissions in the course of the partnership, trade, or business, in violation of law, will implicate those only who are guilty of them, for the willful tort of one partner is not, by virtue of the partnership alone, imputable to the firm: Rosenkrans v. Barker, 115 Ill. 331; 56 Am. Rep. 169; Titcomb v. James, 57 Ill. App. 296, 308.

But one partner is sometimes made, by statute, criminally answerable for the acts of another, in some instances, as for the illegal sale of intoxicating liquors, though he was not present, and did not consent to his partner's violation of law: Whitton v. State, 37 Miss. 379; or the issuing of "change bills," to circulate as money, in contravention of law: Barnett v. State, 54 Ala. 579. In the absence of statute, however, the willful tort of one partner, not committed in the course of the partnership, or for the purpose of transacting its business, is not imputable to the firm: Marks v. Hastings, 101 Ala. 165, 175. In other words, a partner is not, as a general rule, criminally answerable for the acts of his associate, done without his knowledge or consent: Whitton v. State, 37 Miss. 379. For example, if one member of a firm makes a wanton and willful assault upon a woman, he is neither prosecuting the business of the firm nor acting in the interest of his copartner, and the latter is not, therefore, liable for his act: Titcomb v. James, 57 Ill. App. 296. So if one member of a firm, without the knowledge or consent of his copartner, maliciously procures the arrest and imprisonment of a debtor of the firm, and such act fails to be of any benefit to it, the nonparticipating partner, who derives no benefit from the unlawful act, is not answerable for such arrest and imprisonment: Rosenkrans v. Barker, 115 Ill. 331; 56 Am. Rep. 169. And if one member of a firm unlawfully sells ardent spirits, in the absence of his copartner and without his knowledge, the latter is not criminally answerable: Acree v. Commonwealth, 13 Bush, 353. A penalty that an attorney, who fails to pay over money collected shall be stricken from the rolls does not apply to a member of a law firm who did not participate in the receipt or wrongful appropriation of the money. It can be applicable only to the party derelict in duty and personally guilty of the wrong: Porter v. Vance, 14 Lea, 629.

If, however, one partner commits an infraction of the law, and the circumstances are such as to indicate an unlawful trade and guilty knowledge on the part of other members of the firm, they may all be held criminally as well as civilly liable: State v. Bierman, 1 Strob. 256; Stockwell v. United States, 13 Wall. 531; Barnett v. State, 54 Ala. 579; State v. Neal, 27 N. H. 131: United States v. Thomasson, 4 Biss. 99; and a firm cannot recover for contraband goods sold by one of its members: Biggs v. Lawrence, 3 Term Rep. 454. In Alabama, the members of a firm, as partners, may be jointly found guilty, and fined jointly, if they act in that capacity: Lem-

ons v. State, 50 Ala. 130, 133. So two persons composing a partnership may be jointly indicted in the federal courts, for a false return, as to the assessor of internal revenue: United States v. McGinnis, 1 Abb. (U. S.) 120. But in Texas it is held that there can be no partnership in crime, and that a joint verdict against a partnership is erroneous: Allen v. State, 34 Tex. 230. In that state, a partnership cannot be indicted by its firm name. The indictment should be against the members as individuals: Peterson v. State, 32 Tex. 477. All members of a partnership are not liable to be punished with vindictive damages for the wanton acts of one partner, although done in the prosecution of the firm business: Titcomb v. James, 57 Ill. App. 296.

LEBECK *v.* FORT PAYNE BANK.

[115 ALABAMA, 447.]

CORPORATIONS—SALE OF PROPERTY—RIGHTS OF BONA FIDE PURCHASERS OF BONDS RECEIVED IN PAYMENT, AFTER ANNULMENT OF CONVEYANCE AS FRAUDULENT.—If a corporation transfers all of its property, by deed, to another corporation, taking in payment bonds payable to the holder, and, without providing for its debts, divides the bonds among its stockholders, a bona fide purchaser of such bonds is entitled to protection, as such, against a creditor of the grantor, who causes the conveyance to be set aside as fraudulent, and is entitled to a foreclosure of a deed of trust to the property conveyed, given by the grantee to secure such bonds, unaffected, so far as his rights are concerned, by the decree annulling the conveyance and a sale thereunder.

CORPORATIONS—SALE OF PROPERTY—BONA FIDE PURCHASER OF BONDS RECEIVED IN PAYMENT—WHO IS. If a corporation transfers all of its property by deed to another corporation, taking in payment negotiable bonds secured by a trust deed to the property conveyed, and, without providing for its debts, divides the bonds among its stockholders, a person who buys some of the bonds from one of the stockholders, without knowledge that he is a stockholder, or of any facts pertaining to the transactions, except what is disclosed by the bonds, and muniments, which show a clear title to the property conveyed by the trust deed, is a bona fide purchaser.

TRUSTS—CESTUI QUE TRUST IS NOT BOUND UNLESS HE IS A PARTY.—Except in cases where a trustee is empowered to represent the beneficial interests, or where the interested parties are so numerous that it is impracticable to bring them all in, a cestui que trust is not bound by any proceeding in equity to which he is not a party, although the trustee is a party. It is otherwise in a court of law.

PLEADING — EQUITY — MULTIFARIOUSNESS—REPUGNANCY.—A bill in equity is not multifarious or repugnant because it prays that a former decree, annulling a conveyance as fraudulent, be reviewed and corrected for the reason that the complainant was not a party to the suit, or, if that is not the appropriate relief, to have such former decree impeached for fraud on the part of the complainant's trustee, who was a party to the suit.

Bill in equity for review, or to set aside a decree for fraud. The cause was submitted upon demurrers and a motion to dis-

miss the bill for the want of equity. Most of the grounds of demurrer and the motion were sustained, and the bill was dismissed. The complainant appealed.

Mountjoy & Tomlinson, for the appellant.

L. L. Cochran and Davis & Haralson, for the appellees.

449 HEAD, J. On March 20, 1889, the Alabama Sanitarium was incorporated under the laws of Alabama. C. O. Godfrey, A. S. Loventhal, and E. W. Godfrey were the corporators. Authorized capital was forty thousand dollars, and all was subscribed for by said corporators. C. O. Godfrey was elected president. This corporation became the owner of a block of land in Fort Payne, Alabama, an hotel or sanitarium building located thereon, and all the furnishings in the building, which constituted all of its property.

On June 24, 1890, said C. O. Godfrey and eight others were likewise incorporated under the name of "Fort Payne Educational Association."

On January 23, 1891, the sanitarium sold and conveyed by deed all its said real property to the educational association, for the recited consideration of twenty-five thousand dollars, cash; and on January 27, 1891, the educational association executed to the First National Bank 450 of Fort Payne, as trustee, a deed of trust to said property, to secure an issue of three hundred bonds of the educational association, numbered from 1 to 300, inclusive, each for one hundred dollars, maturing September 1, 1895, interest six per cent per annum, payable semi-annually. The deed of trust recited that the bonds and proceeds of their sale were to be devoted "solely to the payment for the academy building and the needs and purposes of the school." The deed is nowhere set out in the record, and we have no information of its contents other than as above stated. It is inferable that it authorized the trustee to sell on default in payment of the bonds. Afterward, the First National Bank resigned as trustee, and E. W. Godfrey was appointed its successor, and he, in the fall of 1892, advertised the property to be sold on October 4, 1892, in default of payment of interest on the bonds.

On September 28, 1892, the Fort Payne Bank, as an alleged creditor of the Alabama Sanitarium, filed its bill in the chancery court of DeKalb county, against the sanitarium, the educational association, Godfrey as trustee, and divers others alleged

to be holders of the bonds, to set aside the said sale by the sanitarium to the educational association as fraudulent, and to subject the property to the payment of complainant's debt; and such proceedings were therein had that, on November 14, 1894, the complainant obtained a decree granting the relief prayed. The property was condemned to sale, and sold by the register for the satisfaction of the complainant's demand—the threatened sale by the trustee having been enjoined.

On July 24, 1895, the complainant in the present cause, Lou Lebeck, filed this bill against the Fort Payne Bank, the sanitarium, the educational association and Godfrey, the trustee, alleging that in the spring of 1891, he became the purchaser from A. S. Loventhal for value, without notice of any infirmity, either in the bonds, or the conveyance of property to the educational association, of sixty of said trust bonds, paying therefor six thousand dollars. The bonds were payable to holder, and then had several years to run to maturity. They recited the execution of said trust deed for their security. The record of the former suit of the Fort Payne Bank, above referred to, was made a part of the present bill, and from it, it appears that two hundred and fifty of the three hundred bonds when issued were delivered [451] to the sanitarium and by it distributed to its stockholders, one of whom was said A. S. Loventhal, leaving the Fort Payne Bank, as a creditor, unprovided for; and it was in this way that Loventhal became possessed of the sixty bonds he sold to Lebeck, the present complainant. But Lebeck alleges in his bill that he had no notice of how Loventhal acquired the bonds and supposed he had purchased the same from the educational association that issued them, and had no notice that the Fort Payne Bank was a creditor of the sanitarium, or that it owed any debts to anyone. He was not made a party to the former suit, and alleges that he resided in Nashville, Tennessee, and had no notice of the suit. The bill complains that the former decree is erroneous on its face, in that it fails to decree relief to complainant therein, subject to the rights of any and all bona fide holders of said bonds, without notice, et cetera, who were not before the court; and with this view prays, if the court should deem it a proper measure of relief, that said decree be reviewed and corrected and the rights of the present complainant as a bona fide holder of said bonds be protected, et cetera, and if this be not the appropriate relief, that the register's sale be set aside and complainant's lien upon the property be enforced, and for general relief.

There were assigned many grounds of demurrer to the bill. We will endeavor to state the principles decisive of those grounds to which we deem it necessary to advert.

The bill does not assail the character of the Fort Payne Bank as the creditor of the sanitarium it professed to be, nor does it deny the alleged fraudulent character of the sale which was set aside. It is impliedly conceded that, subject to the supposed erroneous failure to provide for bona fide holders of the bonds, the said Fort Payne Bank was entitled to the relief it obtained, as against the parties to its bill, who could not defend the same as bona fide holders of bonds. So the inquiry now is, whether Lebeck, the present complainant, is entitled to protection as a bona fide holder; and this involves the consideration of two questions: 1. Whether anything appears in this bill which charges him with notice of the fraudulent nature of the disposition of its property by the sanitarium to the educational association, at the time he purchased his bonds; and 2. Whether he is concluded by the decree in the former suit.

[452] 1. The sanitarium had a right to sell its property, honestly and fairly, to the educational association, as we had occasion to say of the transaction in Fort Payne Bank v. Alabama Sanitarium, 103 Ala. 358. So far as appeared, the sale was made by a regular conveyance of bargain and sale, upon a cash consideration of twenty-five thousand dollars, and the possession of the property transferred to the purchaser. The educational association, for the expressed purpose of raising funds to pay for its academy building and the needs and purposes of its school, issued its negotiable bonds secured by the trust upon this property. These bonds, it appears, were used, in kind, in paying the sanitarium the purchase money of the property. The sanitarium, acting as though it had no creditor unprovided for, divided the bonds among its stockholders, A. S. Loventhal receiving a part thereof. The complainant, according to his bill, knew nothing of any of these matters except what the bonds and the regular chain of title to the property disclosed. Both of these, apart from other extrinsic facts, determined the bonds and their security to be entirely valid. The only circumstances relied on to charge complainant with notice is the fact that A. S. Loventhal was one of the corporators of the sanitarium and an original subscriber to its stock, and that complainant purchased his bonds from him; from which it is argued that complainant ought to have known that the sanitarium received its purchase money in bonds; and, in fraud of its creditors, divided them

among its stockholders. To say nothing of the principle that the rights of a purchaser of negotiable securities are not impaired by a knowledge of facts which would simply put a person upon inquiry which if followed up would lead to knowledge of an infirmity in the securities, so clearly stated in Spence v. Mobile etc. Ry. Co., 79 Ala. 576, this contention would annul the complainant's purchase of the bonds, though it nowhere appears that he knew any fact which would suggest to him a suspicion that Loventhal was even a stockholder in the sanitarium, much less a guilty participant in a fraudulent division of the bonds among the stockholders. The whole case, upon this point, is that Loventhal was found in possession of these negotiable bonds, payable to bearer, reciting that they were secured by a trust deed, to the First National [453] Bank of Fort Payne, to all the real property of the educational association located in Fort Payne, and the complainant purchased and paid for them in open market. The muniments showed a clear title in the educational association to the property conveyed by the trust deed, and complainant knew no fact which impaired that title. Upon the clearest principles of law and equity, he was a bona fide purchaser without notice, entitled to protection against the creditors of the sanitarium.

2. Is he concluded by the decree in the former cause? The trustee of the property was a party to that decree, and this, it is insisted, binds the complainant.

In a court of law, the trustee of another is regarded as the owner of the property. He is there the representative of the cestui que trust. The latter cannot properly be a party to a proceeding concerning the trust estate in a court of law. If there is dereliction on the part of the trustee in his representative character, calculated to injure the cestui que trust, if he is incompetent to properly assert and defend his legal rights in legal forums, or unfaithful therein, the cestui que trust may apply to equity to control his conduct and restrain the jurisdiction of legal tribunals, to the end of his full and complete protection. Hence, an action at law which proceeds to judgment against the trustee, unaffected by fraud, accident, or mistake, binds the cestui que trust: Frank v. Myers, 97 Ala. 437. But in a court of equity an entirely different doctrine obtains. There the cestui que trust is regarded as the owner of the property, and his own representative in reference thereto. He is there separate and distinct from the trustee, and, in a sense, the adversary of the latter. He prosecutes and defends his own interests, and

shapes, through the decrees of the court, the conduct of the trustee. Hence, unless there be something special in the terms of the trust, which confers upon the trustee the power and duty to represent in courts of equity the beneficial interests; unless a power of attorney, so to speak, is conferred upon him to represent those interests, in those forums, a decree in equity affecting the trust estate, rendered against the trustee, in the absence of the cestui que trust, is not binding upon the latter. The cestui que trust is an indispensable party to such proceedings, and he cannot [454] be concluded unless he is made a party: Collins v. Lofftus, 10 Leigh, 5; 34 Am. Dec. 719, and extended note at page 722, citing many authorities.

We, of course, do not refer to that class of cases where the interested parties are so numerous that it is impracticable to bring them all in, and in which a class of persons may be brought in to represent others of similar interests: See interesting discussion of this subject in Campbell v. Railroad Co., 1 Wood, 368. The record in the suit of the Fort Payne Bank did not bring the case within this exception. The bill professed to make all the bondholders parties, and made no allegation, either directly or of facts going to show it, that it was impracticable to bring them in. The case was unlike Campbell v. Railroad Co., 1 Wood, 368, where there were fifteen hundred railroad mortgage bonds, outstanding, and such facts shown that it was impossible to make all the holders of the bonds parties, inducing Judge Bradley to hold that the trustee in the bond mortgage was, in the litigation and decree sought afterward to be set aside, the representative of the bondholders, and that his presence before the court bound them. We must hold, therefore, that the complainant, if the facts alleged be true, is not bound by the former decree, and is entitled to foreclose the deed of trust for the satisfaction of the bonds, unaffected, so far as his rights are concerned, by the former decree and sale thereunder. The bill is clearly sufficient, as an original bill, for this purpose. It is in no sense multifarious or repugnant, because it submits to the court whether relief may be had under it as a bill of review, or a bill to impeach the decree for fraud on the part of the trustee in suffering the decree, of which the bill also complains as a ground of relief. Whether, if it had appeared, as the speaking demurrer filed by the respondents undertakes to suggest, that the trustee was authorized to represent the cestui que trust in courts of equity, the bill may be considered sufficient as a bill of review, or a bill to impeach the former decree for fraud or unfaithful-

ness on the part of the trustee, in the matter of the defense of the former suit, which should, equitably, be visited upon the Fort Payne Bank, we need not now determine. We, of course, cannot look to the demurrer referred to, to ascertain the terms of the trust. Whether the terms of the trust conferred upon the trustee the [455] power and duty to represent, in equity, such interests as the complainant now seeks to enforce, and, if yea, whether that trust was personal to the First National Bank—the trustee named in the deed—or such as might be exercised by a successor appointed by court, are questions which can only be determined safely by an inspection of the deed.

The chancellor erred in sustaining the demurrers to the bill and dismissing it for want of equity, and his decree in that behalf will be reversed, and a decree here rendered overruling the demurrers, and motion to dismiss for want of equity, and remanding the cause for further proceedings. Respondents may answer the bill within thirty days, with power in the chancellor to extend the time on sufficient showing.

Reversed, rendered, and remanded.

BONDS.—A BONA FIDE PURCHASER of a negotiable bond acquires a good title thereto if he pays value for it without notice: East Birmingham Land Co. v. Dennis, 85 Ala. 565; 7 Am. St. Rep. 73.

CORPORATIONS—SALE OF PROPERTY.—CREDITORS of a corporation may enforce their claims against any of its property which has not passed into the hands of a bona fide purchaser: Note to Miners' Ditch Co. v. Zellerbach, 99 Am. Dec. 337. Compare Montgomery Web Co. v. Dienelt, 133 Pa. St. 585; 19 Am. St. Rep. 663, as to fraudulent conveyance by corporation.

TRUSTEES AND BENEFICIARIES — ACTION — PARTIES—JUDGMENT.—A trustee and his cestui que trust are so far independent of each other that an action against one has no effect upon the other, and both are essential parties to a complete determination of any action in reference to the trust estate. A judgment against a cestui que trust, the trustee not being a party, does not bind him: Roberts v. Yancey, 94 Ky. 243; 42 Am. St. Rep. 357.

PLEADING—MULTIFARIOUSNESS.—As to when a bill is not multifarious, see note to Hall v. Henderson, 62 Am. St. Rep. 148, showing that no general principle in regard to it can be extracted from the cases.

FRIX *v.* MILLER.

[115 ALABAMA, 476.]

VENDOR AND PURCHASER — MISTAKE — TITLE IN UNITED STATES—DUTY OF VENDEE.—If one sells land, to which he is supposed to have a good title, but the purchaser subsequently ascertains that the title is in the United States, and that the land is open to entry, he is under no duty or obligation, legal or equitable, to the vendor to enter the land for him and perfect the title for the latter's benefit.

VENDOR AND PURCHASER—COLLUSIVE EVICTION—ACTION FOR BREACH OF WARRANTY.—A collusive eviction is of no force or effect in an action for a breach of warranty. If the collusion appears, the action cannot be sustained.

VENDOR AND PURCHASER—EVICTION UNDER TITLE PARAMOUNT—BAR TO ACTION FOR BREACH OF WARRANTY.—The loss of land by eviction under a paramount title is purely a matter of legal cognizance, and an eviction, pretended and not real, is pleadable in bar to an action for a breach of warranty.

VENDOR AND PURCHASER—EVICTION UNDER TITLE PARAMOUNT—BAR TO ACTION FOR BREACH OF WARRANTY—ILLUSTRATION.—If land, after its purchase, is discovered to be public, and the buyer's son, without fraud or collusion with his father, enters it as a homestead solely for his own use, the fact that neither one informs the vendor of the public character of the land does not affect the purchaser's right of action for a breach of warranty, if he is evicted by his son, or surrenders possession to him under the latter's paramount title so acquired, but a fraudulent or collusive eviction would be a defense.

INJUNCTION—ACTION FOR BREACH OF WARRANTY—WANT OF EQUITY.—If land sold is subsequently discovered by the purchaser to be public land, and the purchaser's son enters it as a homestead solely for his own use, and evicts his father, a bill to enjoin the purchaser's action for a breach of warranty is without equity, where it proceeds upon the theory that the purchaser should have notified the complainant of such discovery; that the purchaser should have entered the land and perfected the title for the vendor's benefit; that by fraud and collusion between the father and son the latter really entered the land for the use of his father; and that the alleged eviction was collusive and fraudulent.

Amos E. Goodhue and Dortch & Martin, for the appellants.

Pugh & Hood and Denson, Burnett, and Culli, for the appellee.

478 HEAD, J. Judson J. Frix is the complainant, and Charles Miller and Martin Miller the respondents in this bill. The substance of the complainant's complaint is, that on January 15, 1892, he sold and conveyed to said Charles Miller, with covenant of warranty, one hundred and forty-nine acres of land which he, and those under whom he claimed, had been in possession of for more than twenty years. That the chain of his title ran regularly back, through successive conveyances, to 1821, and he and his predecessors claimed and held the property as their own, and supposed they had good titles thereto. In fact, the title to a particularly described eighty acres of the land had never passed out of the United States, and said eighty acres was still subject to entry. The said Charles Miller, on his purchase, went into possession, and remained in the undisturbed possession of the land, until a period so unintelligibly stated in the bill as not to be capable of being understood. Said Martin was a son of Charles Miller, who, the bill avers, was, since 1892, a member

of his father's family, residing with his father upon said land. He, Martin Miller, knew all the time that his father had purchased the land from complainant, himself having supplied a portion of the purchase money. Sometime in the year 1894, Charles Miller and ———— Miller (we suppose, by the latter, is meant Martin Miller) ascertained that said eighty acres was public land open to entry. It is averred that said eighty acres lie adjacent to lands of orator, and that orator was entitled, under the laws of the United States, to acquire the title to said 479 lands by the payment of one dollar and twenty-five cents per acre, and that Charles Miller had the right and could have acquired the title to said land as a homestead under the laws of the United States; that said "Charles Miller and ———— Miller fraudulently kept from orator the knowledge which they had acquired that said land was public land and subject to entry; that said Charles Miller did not surrender the possession which he had acquired from orator, and made no effort to put orator back in possession of said land, but procured or permitted his son, Martin Miller, to take advantage of the possession which he had as a member of his father's family, to enter such land as a homestead under the laws of the United States; that said Martin Miller, on the — day of ————, by and with the knowledge and consent of his father, entered said land and received a receiver's receipt for the entry fees." Until this occurred orator had no actual notice that the land was public land, but he believed he had conveyed to Charles Miller a perfect title.

On August 29, 1895, said Charles Miller commenced an action at law against the complainant for the breach of the covenant of warranty, alleging eviction by said Martin Miller under his paramount title acquired from the United States, as aforesaid, which suit is still pending. The bill avers that orator "has frequently offered, and now offers, to perfect the title to said land by the payment of all costs and expenses that may be necessary to procure the title from the United States, either in orator as owner of an adjoining farm, or in said Miller as a homestead, or otherwise to procure the title from the United States. The said Charles Miller has constantly refused to accept such propositions, and persists in pressing his said suit."

The complainant submits himself to the jurisdiction of the court, and offers to do all things necessary, under the direction of the court, to procure and perfect the title to said land in said Charles Miller, and to pay all costs and expenses necessary thereto, and to do whatever, in the premises, may be required by equity and good conscience.

The special prayer is for a temporary injunction of the action at law; that "said Martin Miller hold the title (he may acquire when completed and patent issued therefor) for said entry of said land, as a [480] trustee for said Charles Miller, in so far as to limit said Charles Miller's recovery upon his claim for breach of covenant of warranty to the costs and expenses of acquiring the title from the United States"; that the amount of such costs and expenses be ascertained, and, upon payment of the same by orator, that the action at law be perpetually enjoined. There is a prayer for general relief.

The chancellor sustained a motion to dissolve the injunction, and also to dismiss the bill for want of equity. The appeal is from that action. There were demurrers to the bill, but they were not passed upon.

The gist of the complaint (though in some respects vaguely and imperfectly expressed) appears to be that it was the duty of Charles Miller to the complainant, when he learned that the eighty acres were public land, to have entered it as a homestead, and thus have perfected the title which complainant had undertaken to grant him; or to have communicated to the complainant the information that he had received that the land was public land, affording complainant an opportunity, as adjacent owner, to purchase the eighty acres from the government, at one dollar and twenty-five cents per acre, and thereby perfecting Miller's title; that Miller failed to perform this duty, but, with his son, fraudulently withheld said information, and aided and abetted his son, for some use or benefit to himself to secretly enter the land. Wherefore, in equity, the said Charles Miller should be treated as having perfected his title in one or the other of these methods, and his damage for breach of the covenant of warranty limited to the sum necessary to his reimbursement, which sum he offers to pay, and obtain perpetual injunction of the action for the breach. We say this seems to be the general scope and object of the bill, though its allegations and prayer are somewhat vague and imperfect, rendering the bill demurrable. If the bill, thus considered, contains equity, the motion to dismiss for the want of equity should not have been sustained, notwithstanding the demurrable defects. The latter might be cured by amendment.

We remark, in the first place, that it is too obvious for discussion that Charles Miller was under no sort of duty or obligation, legal or equitable, to Frix, to assume and carry out the duties, obligations, and burdens of [481] entering the land in

question as a homestead; so that phase of the bill gives it no equity.

The bill in its other aspect, when its whole frame is considered, relies for its equity, as we have indicated, upon the theory that, by fraud and collusion between them, Martin Miller entered the land really for the use of Charles Miller, and that the alleged eviction was collusive and fraudulent; hence Charles Miller is entitled only to reimbursement of the cost of entering the land. If the bill does not mean this, it means nothing favorable to complainant. Upon any other theory it is without a shadow of equity. If such were the character of the entry and eviction, it is obvious that Charles Miller has no right of action at law for breach of the covenant, as upon an eviction by Martin Miller, under title paramount, whereby his damages would be measured upon the basis of the total loss of the eighty acres, for the reason that, in such case, the eviction was only pretended and not real. A collusive eviction is of no force or effect in an action for a breach of warranty. If the collusion appears, the action cannot be sustained: Davis v. Smith, 5 Ga. 274; 48 Am. Dec. 279.

Whether, in a proper action, the covenantee guilty of such collusion may recover for the cost of entering the land under the general principle that a vendee, buying in a paramount title, may sue upon the covenant of warranty and recover the amount paid by him for such title, not exceeding the original purchase money and interest, we do not now decide. The action here sought to be enjoined is not of that character. It is for the loss of the land by eviction under a paramount title.

Hence, it is manifest that the grievance complained of, if meritorious at all, is one of purely legal cognizance pleadable in bar of the action at law.

If, without fraud or collusion with Charles Miller, Martin Miller entered the land for his own use—no use, trust, or benefit to accrue therefrom to Charles Miller—the fact that he and Charles Miller failed to communicate to complainant their information that the land was public land would not affect Charles Miller's right of action for breach of the warranty, if he was evicted by Martin Miller, or surrendered possession to him under his paramount title so acquired: Copeland v. McAdory, 100 Ala. 553.

[482] There is no equity in the bill and the decree of the chancellor dissolving the injunction and dismissing the bill for want of equity is affirmed.

EQUITY—TRIAL OF TITLE TO LAND.—A court of equity is not an appropriate tribunal for the trial of title to land: Decker v. Schulze, 11 Wash. 47, 51; 48 Am. St. Rep. 858, 861; Abbott v. Allen, 2 Johns. Ch. 519; 7 Am. Dec. 554.

VENDOR AND PURCHASER—EVICTION—BREACH OF COVENANT OF WARRANTY.—Eviction must be by title paramount to constitute a breach of warrantyof title; and a collusive eviction is no breach of a covenant of warranty: Davis v. Smith, 5 Ga. 274; 48 Am. Dec. 279.

STEELE *v.* WALKER.

[115 ALABAMA, 487.]

PLEADING, "IN SHORT," BY CONSENT—REFERENCE TO EXHIBITS—INTERPRETATION.—If a plaintiff consents that a plea shall be taken "in short," merely giving a skeleton or outline of the defense, without stating the facts constituting it, but referring to exhibits attached to, and forming a part of, the plea, the pleading must be interpreted as if the outlines were filled, or drawn out in extenso, averring the particular facts, so far as they may be deduced from the exhibits, essential to constitute the defense they indicate.

RECEIVERS—JURISDICTION OF FEDERAL COURT—SUBJECT MATTER—PARTIES—TRESPASS—REMEDY OF STRANGER—INTERVENTION.—If a receiver is appointed by a federal court, in a suit where it has plenary jurisdiction of the subject matter, the court has jurisdiction of the res, and, through the receiver, may take possession of it without regard to whether all claimants are, or are not, before it as parties. If it authorizes the receiver to take possession, the remedy of a stranger to the proceedings, who claims title to a part of the property, is by intervention in the suit before the federal court. He cannot maintain trespass against the receiver, on the ground that he was not made a party to the suit, for the court's order, in such a case, is not void.

JUDGMENT OR DECREE—INTERLOCUTORY ORDERS—DESCRIPTION OF PROPERTY—CERTAINTY.—The general rule is, that property which is the subject of a judgment or decree must be described with such certainty that it may be identified and distinguished from other property of like kind, but this degree of certainty is not required as to interlocutory orders, for they are not the source or foundation of title to property, and errors will readily be corrected by the court, at the instance of a party aggrieved.

JUDGMENT OR DECREE—INTERLOCUTORY ORDERS—DESCRIPTION OF PROPERTY—CERTAINTY—ILLUSTRATION.—A decretal order appointing a receiver and authorizing him to take possession of certain railroad lands, "except such portions thereof as are coterminal to and with that portion of the Mobile & Girard Railroad, extending from Girard to Troy, Alabama, and except such portions thereof as may be in the actual possession of bona fide purchasers for value from the said railroad company, and except such portions thereof as the said railroad company earned and sold in accordance with the terms and conditions of the act of Congress of June 3, 1856," is not so indefinite as to be void for uncertainty.

INTERVENTION IN EQUITY, EFFECT OF—PARTIES.—If one, by intervention in a court of equity, asserts a right to property, of which the court has jurisdiction, he makes himself a party to the suit and cannot prosecute his right in any other forum.

RECEIVERS—SEQUESTRATION—JURISDICTION — SUBJECT MATTER—PARTIES.—The sequestration of property, the subject matter of a suit in equity, that it may be preserved in its integrity, pending the making of future orders in reference to it, or pending the suit, is within the inherent jurisdiction of the court. The sequestration is in rem, drawing the property into the custody and control of the court, and binds the property, though there may not be jurisdiction of all the persons having rights or interests in it.

TRESPASS—MARSHAL OF FEDERAL COURT—NONLIABILITY.—A marshal of a federal court, who seizes property under its order, to be held pendente lite, is not answerable in trespass to a stranger claiming title to the property.

Trespass brought by the appellant, W. B. Steele, against the appellee, B. W. Walker, to recover damages for the taking of a quantity of logs. The main contention on demurrer to the third plea was, that as the plaintiff was not a party to the suit in the circuit court of the United States, the federal court was without jurisdiction to authorize the defendant, as receiver, to take possession of the logs claimed by him. The fifth and seventh pleas were also demurred to. These causes of demurrer in general terms, assailed the order of appointment, as void for indefiniteness. The plaintiff appealed from a verdict and judgment for the defendant.

Thomas H. Watts, for the appellant.

Roquemore & White, for the appellee.

488 BRICKELL, C. J. This was an action of trespass for the taking of a quantity of logs, in which the appellant was plaintiff, and the appellee was defendant. The defendant pleaded the general issue, with three special pleas; to the latter, the plaintiff filed demurrers which were overruled, and the overruling of them is the matter of the assignments of error.

The pleas were taken "in short by consent"; they do not state, or profess to state, the facts relied on as constituting the defense. They are, in fact, mere skeletons, or outlines, referring to exhibits attached to and forming parts of them, from which the facts relied on in bar of the action are to be deduced. A plaintiff consenting to this mode of pleading must be deemed to consent that the pleas shall be interpreted as if the outlines were filled, as if they were drawn in extenso, averring the particular facts, so far as these facts may be deduced from the exhibits essential to constitute the defense they indicate; otherwise, the consent would be unmeaning. This is the interpretation of the pleas on which the demurrer seems to proceed, and it is this interpretation we will adopt, in considering their sufficiency.

The plea numbered 3, the first to which the assignments of error refer, sets up in bar of the suit a decretal order of the circuit court of the United States for the middle district of Alabama, rendered on the eighth day of November, 1890, in a cause therein pending, wherein the United States was the complainant, and the Mobile & Girard Railroad Company, a corporation organized and existing under the laws of this state, and a large number of natural persons, were defendants. The plea annexes as exhibits a copy of the original bill filed in the cause, and of the decretal order to which reference is made. The objects and purposes of the original bill were the vacation of a certification of the public lands [489] to the Mobile & Girard Railroad Company, which had been made to the secretary of the interior under the act of Congress of June 3, 1856, granting lands to the state of Alabama to aid in the construction of railroads; to reclaim and restore to the public domain such parts of the lands as were forfeited by the failure of the railroad company to perform the conditions upon which the grant was dependent; to restrain trespasses on the lands; to recover timber which had been severed from the freehold; to obtain the appointment of a receiver pendente lite to take possession and control of the lands, and of all timber, logs, lumber, and structures thereon. The decretal order appoints the defendant receiver, with direction and authority, to use the language of the order, "to take possession, charge, and control of the lands described in the bill, and of all the timber, trees, and lumber, logs and buildings and structures thereon," excepting from its operation lands which, as described, were not subject to forfeiture and reclamation by the United States. Construing the plea, as we have expressed the opinion it must be construed, it must be accepted as averring that the logs, the making of which constitutes the gravamen of the action, were found upon the lands not excepted from the operation of the decretal order; that they had been severed from the freehold; and that it was in the right and capacity of receiver they were taken possession of by the defendant. The plaintiff assigned a number of causes of demurrer to the plea, all of which, except two, in language not materially variant, assert the proposition that as the plaintiff was not a party to the suit, the circuit court was without jurisdiction to authorize the defendant as receiver to take possession of logs claimed by him. The remaining clauses of demurrer, in general terms, assail the order of appointment as void for indefiniteness.

It has not been, and cannot be, doubted that the circuit court of the United States, sitting as a court of equity, had jurisdiction of the subject matter of the suit pending before it; nor, if that were now a pertinent inquiry, that a case was presented in which rightfully it could exercise the power of appointing a receiver. The United States can, and are accustomed to pursue, for the protection or for the reclamation of the public lands, the equitable remedies an individual, under like circumstances, [490] may pursue in reference to his own lands, and is entitled to the same measure of relief which would be extended to him: United States v. Minor, 114 U. S. 233; United States v. Missouri etc. R. R. Co., 141 U. S. 358; San Pedro etc. Co. v. United States, 146 U. S. 120. The grant of lands to the state under the act of Congress of June 3, 1856, was a grant in praesenti, subject to defeasance by reason of nonperformance of the conditions upon which it depended. The breach of the conditions did not ipso facto work a forfeiture of the grant, nor cause a reversion of the lands. The title remained in the state, or in the railroad company, succeeding to the title of the state, until the United States asserted the forfeiture either through judicial proceedings, or by legislative action manifesting an intention by Congress to reassert title and resume possession: Schulenberg v. Harriman, 21 Wall. 44; Van Wyck v. Knevals, 106 U. S. 360; St. Louis etc. Ry. Co. v. McGee, 115 U. S. 469; United States v. Southern Pacific R. R. Co., 146 U. S. 570.

The circuit court having plenary jurisdiction of the subject matter of the suit, and in the exercise of the jurisdiction having appointed the defendant receiver, authorizing him to take possession of the logs, which, if severed from the lands subject to forfeiture, like the lands, were the property of the United States, the jurisdiction was not limited to the parties to the suit; it had jurisdiction of the res, and through the receiver could take custody of it, without regard to whether all claimants were or were not before it as parties. If the bill had shown that the logs were in possession of the plaintiff, or of any other stranger to the suit, the court would, doubtless, have ordered an amendment of the bill, making the person having the possession a party, or have instructed the receiver to institute the proper action for the recovery of the possession: Davis v. Gray, 16 Wall. 203-218; Parker v. Browning, 8 Paige, 388; 35 Am. Dec. 717; 2 Story's Equity Jurisprudence, sec. 833. But it was not shown by the bill that the logs were not in possession of parties to

the suit, or that there were strangers claiming any right to or interest in them; and the receiver having passed into possession of them, his possession was the custody and possession of the court, not to be interfered with, or disturbed by suit against him: Beach on Receivers, secs. 213, 214; High on Receivers, sec. 139; 2 Story's Equity Jurisprudence, sec. 833 a; Ex parte Cochrane, [491] L. R. 20 Eq. Cas. 282; Krippendorf v. Hyde, 110 U. S. 276. If this was not the true doctrine, in many cases, of which this is one as presented by the original bill, the appointment of a receiver would be, if not vain and nugatory, but the beginning of multiplied litigation, delaying the administration of justice. From it results no hardship to strangers to the suit having rights or interests in the property affected. For the protection of such rights or interest, they may intervene in the suit in which the receiver is appointed, and the court, taking care that full justice is done, may entertain the intervention, and in that suit grant appropriate relief, or, if the exigencies of the particular case require, may authorize an independent action in another forum against the receiver. The particular causes of demurrer we are considering are limited to the single point that the order authorizing the receiver to take the logs in possession, as to the plaintiff, was void—a nullity—because he was not a party to the suit, a contention which cannot be supported.

Prior to the act of Congress of March 3, 1887, the enrollment of which was corrected by an act approved August 13, 1888, receivers of the appointment of the courts of the United States, without the previous leave of the court appointing them, were not subject to suits in other courts; the leave was jurisdictional, and the absence of it pleadable in bar: Barton v. Barbour, 104 U. S. 126. The third section of the act of Congress referred to authorizes suits against such receivers in other courts without the previous leave of the court appointing them, "in respect of any act or transaction of his in carrying on the business connected with such property," et cetera. It is not insisted that the construction of the act lies within the scope of the demurrers, nor has it been suggested that it authorizes a suit of this character. We have, therefore, no occasion to express an opinion on its construction or the extent of its operation.

The indefiniteness or uncertainty in the decretal order imputed by the two remaining causes of demurrer is supposed to consist in the exception from its operation of parts of the lands described in the original bill. The exception is expressed in

these words: "Except such portions thereof as are coterminal to and with that portion of the Mobile & Girard Railroad, extending [492] from Girard to Troy, Alabama; and except such portions thereof as may be in the actual possession of bona fide purchasers for value from the said railroad company; and except such portions thereof as the said railroad company earned and sold in accordance with the terms and conditions of the act of Congress of June 3, 1856." The decretal order must be referred to and read in connection with the original bill, which alleges the construction and operation of the railroad along the line of its definite location, from Girard, one of its termini, to Troy; and this being true, the lands excepted from the operation of the decretal order were not subject to forfeiture or reclamation by the United States, and there would have been no propriety in extending the receivership to them. The argument is, that the receiver could have ascertained and distinguished the lands excepted from the lands of which he was authorized to take possession only by a resort to extrinsic evidence, and that, of consequence, the decretal order is void in its entirety. The general rule is that property which is the subject of a judgment or decree must be described with reasonable, not with absolute, certainty—with such certainty that it may be identified and distinguished from other property of like kind: 1 Freeman on Judgments, 4th ed., sec. 500; 2 Jones on Mortgages, sec. 1462; Hurt v. Blount, 63 Ala. 327; Hurt v. Freeman, 63 Ala. 335. The rule must be of limited application to decretal orders, in their nature interlocutory, under the control of the court until the rendition of the final decree. Such orders do not become the source or foundation of title to property, and while it is desirable in practice to render them as certain as practicable, there is not the reason for exacting from them that degree of certainty required to support a final judgment or decree. The exception is in the nature of a direction or instruction to the receiver, and if he erred in its application, either in the taking possession of lands embraced by it, or in failing to take possession of lands not embraced by it, the court, at the instance of the party aggrieved, would readily have corrected the error. Without inquiring what would be the force and effect of a final judgment or decree, the source of title to lands, expressed in the words of the exception, we do not regard it as affecting the validity of the decretal order. We cannot say that the purpose of the [493] court not to extend the receivership to the lands not the subject of forfeiture or recla-

mation by the United States could have been expressed more intelligibly. As we interpret it, the plea avers that the logs were found upon, had been severed from, and had been taken possession of by the defendant on the lands not within the exception—the lands to which the receivership extended. The demurrer was an admission of the truth of the averment, and, the averment being true, it is not in this action whatever of right or interest in the logs the plaintiff may have can be asserted.

The next plea, numbered 5, to which the assignments of error refer, when taken in connection with the exhibits annexed, must be regarded as averring that before the institution of this suit, the plaintiff had intervened by petition, in the suit in the circuit court of the United States, averring ownership of the logs, and praying that they be delivered up to him, or their value be paid him. This is the substance of the petition he filed, which may not be formal and technical pleading, but no objection was taken to it; nor was any objection taken, if the fact exists, that it was filed without leave of the court. In this state of the record pleaded, the plaintiff must be taken as having made himself a party to that suit, elected to submit to the jurisdiction of the court, as if he had been made originally a defendant: 1 Foster's Federal Practice, secs. 201, 202; French v. Gapen, 105 U. S. 509-525; Krippendorf v. Hyde, 110 U. S. 276. The causes of demurrer to this plea are, perhaps, too general; but, without resting our decision upon that point, we do not regard them as well taken. Having elected to make himself a party to the suit in the circuit court, it is in that forum only the plaintiff can prosecute his right to the logs, of which the court has possession: Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334.

The seventh plea, the last to which the assignments of error refer, purports to be a plea of justification under process, and annexes as exhibits the copy of the original bill, and of an order it styles an order of seizure, made in the cause by the circuit court, on the eighteenth day of February, 1890, and of an affidavit of W. T. Paulk and J. B. Adams, to which the order refers. The order was rendered on an application by the complainant in the original bill for a rule requiring the defendants to show
494 cause why a receiver should not be appointed, and an injunction granted pendente lite, in accordance with the prayer of the bill. The part of the order now material is in these words: "It is further ordered that pending said rule to show cause, the United States marshal of the middle district of Ala-

bama do so far take possession and control of said lands, described in the bill (except such portions thereof, as may be in the actual possession of bona fide purchasers for value from said railroad company, and except such portions thereof as the said railroad earned and sold in accordance with the terms and conditions of the act of Congress, approved June 3, 1856, granting lands to said railroad), as to maintain the status quo, and prevent the removal of any timber trees, logs, or lumber, which may be found on the said lands, or which has been cut and removed from said lands, waiting transportation, and now within said district and described in the affidavits filed with bill, and so hold the same, until the further order of the court. It is further ordered that the clerk issue copies of this order to defendants named in the original bill, as well as to the persons named in the affidavit of W. T. Paulk, J. B. Adams, and James Wisher, that the same be served without delay." The part of the affidavit of Paulk and Adams, now material, states that William B. Steele had in certain streams about ten thousand pine logs, bearing a particular brand, and of particular dimensions, ninety per cent of which had been cut from lands in a particular township and range, known as the Mobile & Girard Railroad lands, awaiting high water for floatage to market.

Reading the plea in connection with the exhibits, and adopting the construction we have been constrained to adopt in construing the other pleas, it must be accepted as averring that the defendant was the marshal of the United States, for the middle district of Alabama; that the plaintiff was the William B. Steele mentioned in the affidavit of Paulk and Adams; that the logs taken by the defendant were the logs described in that affidavit; that the taking was under the authority and in obedience to the order. The plaintiff assigned the causes of demurrer which were assigned to the third plea, and in addition two others: "The plea and exhibits do not show any justification for taking the logs of plaintiff." [495] "The plea and exhibits do not show any defense to this action."

The error underlying the argument in support of the demurrer is in the supposition that the jurisdiction to order the seizure of the logs, and the holding of them during the pendency of the rule to show cause, was dependent on the jurisdiction of the person of the plaintiff. The sequestration of property, the subject matter of a suit in equity, that it may be preserved in its integrity, pending the making of future orders in reference to it, or pending the suit, is not unusual; it lies within the in-

herent jurisdiction of the court. The sequestration is in rem, drawing the property into the custody and control of the court, and binds the property, though there may not be jurisdiction of all the persons having rights or interests in it: Angel v. Smith, 9 Ves. 335; Russell v. East Anglian R. R. Co., 3 Macn. & G. 104; Krippendorf v. Hyde, 110 U. S. 276; Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294.

We do not deem it necessary to prolong the discussion of the case. As we feel constrained to construe the pleas, the demurrers were not well taken, and the judgment overruling them must be affirmed.

RECEIVERS—SUITS AGAINST.—The custody of a receiver is the custody of the court, and he cannot be sued without leave of the court that appointed him: Bell v. American Protective League, 163 Mass. 558; 47 Am. St. Rep. 481; People v. Brooks, 40 Mich. 333; 29 Am. Rep. 534. Suing him without leave of court would only raise a question of contempt, and would not affect the right involved in the suit: Chautauque County Bank v. Risley, 19 N. Y. 369; 75 Am. Dec. 347. The title to the property does not change because of his appointment: Bell v. American Protective League, 163 Mass. 558; 47 Am. St. Rep. 481, and note, showing that he holds the property for the benefit of whoever may eventually establish title thereto. But in Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753, it is held that receivers appointed by the United States courts are subject to suit in any court having jurisdiction of the subject matter without asking leave of the court which appointed them.

JUDGMENT—UNCERTAINTY IN DESCRIPTION.—A judgment in ejectment which describes the land as in the pleadings and verdict is not void on its face for uncertainty in description: Carlisle v. Killebrew, 91 Ala. 351; 24 Am. St. Rep. 915. Compare Bowen v. Wickersham, 124 Ind. 404; 19 Am. St. Rep. 106, as to the sufficiency of a description of property in a decree of sale. See, also, the note to De Sepulveda v. Baugh, 5 Am. St. Rep. 459.

TRESPASS.—FEDERAL OFFICERS may be sued in the state courts for trespasses committed by them under process issued out of a court of the United States: Ward v. Henry, 19 Wis. 76; 88 Am. Dec. 672; Bruen v. Ogden, 11 N. J. L. 370; 20 Am. Dec. 593; Dunn v. Vail, 7 Mart. 416;12 Am. Dec. 512.

RULES RESPECTING RECEIVERS.—In Southern Granite Co. v. Wadsworth, 115 Ala. 570, the defendant was appointed by a circuit court of the United States as receiver for Chapman, Reynolds & Co., in a suit brought against that firm by the Union National Bank of Chicago. Wadsworth was ordered, as such receiver, to take charge of all the property of the firm, and did take charge, as receiver, of certain specifically described pieces of granite, which the granite company sought to recover, but it brought an action of detinue therefor without order or leave of the federal court, and, at the commencement of such action, the circuit court was in possession of the property, by its receiver, and had ordered it to be sold.

The court, in rendering its opinion, said that a generally accepted rule in respect to receivers is that: "A receiver being appointed for the preservation of the fund or property pendente lite, and for its ultimate disposal according to the rights and priorities of the parties entitled, the remedy is regarded as in the nature of a se-

questration, rather than as an attachment of the property, and it ordinarily gives no advantage or priority to the person at whose instance the appointment is made, over other parties in interest. Nor does it change the title to, or create any lien upon, the property; its purpose, in this respect, being rather like that of an injunction pendente lite, to preserve the subject matter until the rights of all the parties may be judicially determined": Citing High on Receivers, sec. 5.

"The same doctrine is expressed by the supreme court of the United States as follows: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property' ": Union Bank v. Kansas City Bank, 136 U. S. 223; Talladega Mercantile Co. v. Jenifer Iron Co., 102 Ala. 259.

Another rule quoted from the author above cited, and "so sanctioned by authority as not to be questioned," is that: "A receiver being an officer of the court, acting under its direction, and in all things subject to its authority, it is contrary to the established doctrine of courts of equity to permit him to be made a party defendant to litigation, unless by consent of the court appointing him. And it is, in all cases, necessary that a person desiring to bring suit against a receiver, in his official capacity, should first obtain leave of the court by which he was appointed, since the courts will not permit the possession of the receiver to be disturbed by suit or otherwise, without its consent or permission. The rule is established for the protection of receivers against unnecessary and expensive litigation, and, in most instances, a party aggrieved may have ample relief, by application on motion, to the court appointing the receiver. And when an action is instituted against a receiver, in his official capacity, without first obtaining leave of the court, the plaintiff in such action is guilty of a contempt of court, and will be punished accordingly": High on Receivers, sec. 254.

"It is true," said the court, "that Congress, by the act of March 3, 1887, as revised and corrected August 13, 1888, provided for the bringing of suits against receivers appointed by any of the courts of the United States, in respect to any act or transaction of his in carrying on the business connected with such property, without previous leave of the court in which such receiver or manager was appointed, which suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed; so far as the same is necessary to the ends of justice. The effect of this act, as has been held, is to allow such suits in all matters growing out of the management of the property in charge of receivers, to the extent of allowing the establishment of a debt by the judgment of another court against the receivership, leaving the matter of its payment and the adjustment of all equities between different claimants interested in the property, to the determination of the court which appointed the receiver, and that no court can interfere with the custody of property held by another court through a receiver": High on Receivers, sec. 395b, and authorities there cited.

The court, therefore, held that the plaintiff could not maintain its action against the receiver, as such, without the consent or order of the federal court appointing him; that whether the federal court assumed possession and control of the property rightfully or not was immaterial; that the title to the property was not disturbed

by the court in assuming possession and control of the property; that the question of ownership was one which the federal court was competent to decide; that the question of title belonged to the federal court, and was one over which the state court had no jurisdiction; and that the plaintiff's remedy for the enforcement of his right was by intervention by petition in the federal court.

DRENNEN *v.* MERCANTILE TRUST AND DEPOSIT CO.

[115 ALABAMA, 592.]

WAGES—PRIORITY OF CORPORATION EMPLOYES OVER BONDHOLDERS—RECEIVER.—THE EQUITABLE DOCTRINE that employés of a corporation, which has passed into the hands of a receiver, on a bill for foreclosure, and the like, filed by, or in behalf of, the holders of its bonded indebtedness, secured by mortgage or deed of trust, are given a preference, or priority of payment, over the bondholders, in respect to wages earned within a short period before the appointment of the receiver, is not confined to railway corporations, but applies to private corporations, such as a mining and coke manufacturing concern.

WAGES—PRIORITY OF CORPORATION EMPLOYES OVER BONDHOLDERS—RECEIVER—DIVERSION OF GROSS INCOME.—If a private corporation, such as a mining and coke manufacturing concern, passes into the hands of a receiver, on a bill for foreclosure, filed by the trustee of the holders of its bonded indebtedness, which is secured by a deed of trust, and the gross income of the corporation has been, in one form or another, diverted from the payment of wages due its laborers and operatives, and converted, directly or indirectly, to the use and benefit of the bondholders, such wages, and the accounts of supply or materialmen, for labor done and supplies furnished recently before the appointment of the receiver, are entitled, in equity, to preference and priority of payment over the bondholders.

WAGES—PRIORITY OF CORPORATION EMPLOYES OVER BONDHOLDERS—RECEIVER—PREFERENCE AS TO "MONEYED ASSETS."—If laborers to whom wages are due from a private corporation, intervene, by petition, in a pending suit for the appointment of a receiver and the foreclosure of a mortgage given to secure the company's bonded indebtedness, averring that the company, when the receiver was appointed, held and owned accounts or claims for products sold, for a large amount, such accounts, or their proceeds, constitute "moneyed assets," which are a part of the gross earnings of the corporation, and they belong to the employés in preference to the bondholders. If they are still uncollected in the hands of the receiver, the petitioners, under a general prayer for relief, are entitled to have their claims charged upon them; if they have been collected and the money is in the hands of the receiver, the petitioners are entitled to have their debts paid out of it; and if their proceeds have been paid to the bondholders, or expended in the administration of the receivership, the claims of the petitioners, under a special prayer for relief, should be made a charge on the corpus of the mortgaged property, and paid out of the first moneys coming into the hands of the receiver.

WAGES—PRIORITY OF CORPORATION EMPLOYES OVER BONDHOLDERS—RECEIVER—EQUITY MUST BE SHOWN.—Wages and accounts of laborers and employés of a cor-

poration, accruing recently before the appointment of a receiver, are, under proper averments and proof, enforceable to the extent that the work or services performed contributed to the permanent improvement or betterment of the property, or were necessary to keep it a "going concern," but the equity of the laborers or employés, as against bondholders, cannot be supported on either of these grounds unless the petition states the facts justifying it.

ASSIGNMENT—RIGHT OF ASSIGNEE TO ASSERT PRIORITY OF CLAIM.—The priority of claims held by the employés of a corporation over the lien of a mortgage upon the property of the corporation, may be asserted by an assignee of the claims.

INTERVENTION—PARTIES—HOW MADE, BY PRAYER THAT NOTICE BE GIVEN—If a petition for intervention is filed in a pending chancery suit, with a prayer that notice of its filing be given to the parties to the pending suit, this is sufficient to make them parties to the intervention.

INTERVENTION—PLEADING—INFORMATION AND BELIEF.—The averment of a material fact on the information and belief of the petitioner, in a petition for intervention in a pending chancery suit, is sufficient.

Walker, Porter & Walker, for the appellants.

John P. Tillman, for the appellee.

602 McCLELLAN, J. The Mary Lee Coal and Railway Company having made default in the payment of the interest on its bonded indebtedness, the trustee in the mortgages executed by said company to secure its said indebtedness, seasonably after such default made, filed a bill in the city court of Birmingham praying the appointment of a receiver "with full power and authority to demand, sue for, collect, receive, and take into his possession the goods, chattels, rights, credits, moneys, and effects, lands, tenements, books, papers, and property belonging to the said Mary Lee Coal and Railway Company, and that said receiver may receive from the said court, in addition to the ordinary powers possessed by such receivers, full power and authority to manage, run, and operate said property, and to carry out any and all contracts that said company may have made (and to renew the same), connected with the conduct of their business, and especially the contract with T. G. Bush, receiver, if essential thereto to pay to the said Bush, receiver, any indebtedness which may now be due him, and to preserve and protect the corporate franchises, privileges, and property, and to preserve the corporate existence of the said company, and to preserve all corporate property from being sacrificed under any proceeding phich can or may be taken and would be likely to prejudice or sacrifice the same, and that an injunction may issue against the said defendant company and all persons claiming to act by, through, or under it, and all other persons, to restrain them

from interfering with the said receiver's taking possession of and managing the said property." The further prayer of the bill is for the ascertainment of the mortgage indebtedness, principal and interest, a decree requiring the defendant to pay [603] the same by a short day to be named by the court, and, in default of such payment, for a decree that said company and all other persons claiming under it be absolutely barred and foreclosed of and from all right of equity of redemption in and to said premises, and for a decree directing the sale of the whole mortgaged premises for the payment of said bonded indebtedness and the interest thereon, et cetera.

The premises embraced in the mortgages, and for which a receiver and sale are thus prayed, consisted of a coal mine and plant complete, coking ovens, and a railway in Jefferson county. The railway was six or seven miles in length, built primarily, it may be admitted, for the development and to be used in the working of defendant's said mine, but defendant's charter, which authorized the construction and operation of this railway, required that defendant should transport persons and the property of others upon it, so that as to this road the defendant corporation was a common carrier.

A receiver was appointed in accordance with the prayer of the bill, and took possession of all the property and effects of the respondent corporation. The bill was filed and the appointment made on November 28, 1893.

On February 20, 1894, Drennen & Co. filed a petition in the cause, which, as finally amended, presents the following averments: That the defendant, the Mary Lee Coal and Railway Company, is indebted to petitioners in the sum of fourteen thousand six hundred and ninety-seven dollars and fifty-two cents, including interest to time of filing the petition, and that all this indebtedness had accrued during the months of August, September, October, and November, 1893; that, as shown by the bill, said defendant owned and operated a coal mine, coke ovens, and a railway in Jefferson county at the time of the appointment of the receiver under said bill, and that the defendant had carried on these operations for six months prior to such appointment, and that the company then owed a large amount of back wages to its employés and operatives, a great part of which was due to them for work and labor done in said mine and in and about said coke ovens and railway; that the amount alleged to be due petitioners from said company is a part of such back wages due by defendant to its said employés and operatives for

work and labor done and performed for the defendant during the [604] months of July, August, September, October, and November, 1893, and the books and accounts of petitioners, showing the said amount alleged to be due them, have been compared and checked over with the books and accounts of the defendant, which are in the possession of the receivers in the cause, and both sets of books and accounts agree as to said amount due the petitioners; that the work done by said employés and operatives during said months consisted in part in digging and mining and shipping coal, in keeping said mine in operation and in preparing said coal for shipment, and that about eight thousand nine hundred and forty-seven dollars and fifty-two cents of the amount due petitioners was for this work, in other part, to the extent of about seven hundred and fifty dollars in value, in operating and repairing defendant's said railroad, and for the rest, to the extent of about five thousand dollars, in the operating and repairing said coke ovens and in preparing coke for shipment to market, and that all said work was necessary to enable the defendant to carry on its business, and was done for the benefit of the complainant in the cause and to preserve the property and franchises of the defendant embraced in the deeds of trust to the complainant; that petitioners have been informed and believe, and so state, that there was due to the defendant at and before the time of the appointment of the receiver the sum of about forty thousand dollars, for coal and coke sold by the defendant, which had been taken from said mine and manufactured in said ovens, that forty thousand dollars represented gross earning of the defendant into which the labor of said employés and operatives entered, and that they performed work and labor in mining said coal and in manufacturing said coke; that defendant was, and had been for a year or more prior to the appointment of the receiver, a corporation duly organized under the general laws of Alabama, and as such had power to condemn land for railroad purposes and to operate its said railroad as a common carrier, and did so operate it; and that petitioners for value purchased from said employés and operatives their claims against the defendant, aggregating said sum of fourteen thousand six hundred and ninety-seven dollars and fifty-two cents, and said claims were duly transferred and assigned to them before the appointment of said receiver. The following is the prayer of this petition: "That your honors will take jurisdiction of this petition, and that a day be fixed or set for the hearing of the same, and that such [605] notice as is

required by law and the rules of your honors' court be given or served upon the parties to this cause; and that upon the hearing of this, their petition, your honors will render a decree declaring, or establishing, the said claim of the petitioners a prior and preferred claim to and over said mortgages or deeds of trust of complainant; and that the said receivers be required to pay said claim of petitioners out of the first moneys that come into their hands over and above what shall be necessary to pay the running and operating expenses of said property. Petitioners ask and pray for all other and such other orders and decrees as may be necessary in the premises." The petition is verified, one of the petitioners making oath that its allegations and statements made of his own knowledge he knows to be true, and those made upon information and belief he believes to be true.

To this petition the complainant in the cause interposed a demurrer assigning numerous grounds of objection to its sufficiency. The assignments chiefly relied on may be summarized as follows: 1. That the petition fails to show that the Mary Lee Coal and Railway Company is a railroad corporation; 2. That the petition fails to show that the receivers have any money in their hands subject to the payment of petitioners' claim; or that complainant or the bondholders ever received any moneys that should have been paid to the petitioners; or that they were ever paid anything on their bonds after the accrual of the claims of petitioners; or that the security afforded by said mortgages was enhanced or improved in value by the rendition of the services referred to in the petition; 3. That the petition fails to show that the Mary Lee Coal and Railway Company ever diverted any of its gross earnings from the payment of its running expenses either for the improvement or betterment of its said railroad or other property, or for the payment of interest on any of the bonds secured by said deeds of trust, or any of the other charges secured by either of said deeds. And there are other assignments, based on the grounds above stated, going separately to the particular claims of petitioners for work, et cetera, done on the railroad, on the coke ovens, and in manufacturing and shipping coke, and in the mine, severally. These need not be further set out at this place.

606 The city court sustained complainant's demurrer, and dismissed the petition, and from that decree petitioners prosecute this appeal.

The equitable doctrine, whereby employés of railway corporations which have passed into the hands of receivers, on bills

for foreclosure and the like filed by or in behalf of the holders of their bonded indebtedness secured by mortgage or deed of trust, are given a preference and priority of payment over the bondholders in respect of wages earned within a short period—generally said to be six months—before the appointment of the receiver, is thoroughly well established in other jurisdictions, and especially in the decisions of the supreme court of the United States: Fosdick v. Schall, 99 U. S. 235; Miltenberger v. Logansport Ry. Co., 106 U. S. 286; Burnham v. Bowen, 111 U. S. 776; Kneeland v. American Loan Co., 136 U. S. 89; Union Trust Co. v. Illinois etc. Ry. Co., 117 U. S. 434; Farmers' Loan etc. Co. v. Kansas City etc. Ry. Co., 53 Fed. Rep. 182; Poland v. Lamoille Valley R. R. Co., 52 Vt. 144; Litzenberger v. Jarvis etc. Mortgage Trust Co., 8 Utah, 15; Union Trust Co. v. Souther, 107 U. S. 591; Morgan's R. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171; Hale v. Frost, 99 U. S. 389.

The grounds of this doctrine, and its extent and limitations, are nowhere more lucidly and forcibly stated than in the opinion of Chief Justice Waite in Fosdick v. Schall, 99 U. S. 235, where it is, we believe, first clearly expounded and declared; and we cannot do better here than to quote the language of that learned judge: "As to the second question, we have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The [607] amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

"The business of all railroad companies is done to a greater

or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debt made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future rent receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged [608] premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control: Galveston R. R. v. Cowdrey, 11 Wall. 459; Gilman v. Illinois etc. Tel. Co., 91 U. S. 603; American Bridge Co. v. Heidelbach, 94 U. S. 798.

"The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

"We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands, as if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus, 609 it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not infrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must, to a greater or less extent, influence the chancellor when he comes to act. The power rests upon the fact that, in the ad-

ministration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion": Fosdick v. Schall, 99 U. S. 235, 251, et seq.

The subject matter involved in the case of Fosdick v. Schall, 99 U. S. 235, was railroad property, and stress is laid upon that fact in the opinion. Moreover, in all the cases cited above as sustaining this doctrine, the question arose between mortgagees of railroad property, or receivers of railroads, and persons who claimed to have furnished labor or supplies in the operation of the loan or to have put permanent improvements and betterments upon the property; and this character of the property is not infrequently referred to in these cases as one of the grounds or reasons for the existence of the doctrine; nor is there lacking in [610] many of them expressions, which are perhaps no more than dicta of the judge writing the opinion, to the effect that the rule has never been and cannot be extended to the property of any other corporation or class of corporations. The application of the principle to railroad corporations and property, and the view that it should not be extended to other corporations and their property, is based partly upon the supposed peculiarities of such corporations in the manner of conducting their business, adverted to somewhat by Chief Justice Waite, supra, but mainly on their public character, the public uses to which their property is devoted, the public convenience which their business is to conserve, the right and interest which the public have in the carrying on of their business, without break, let, or hindrance, and their corresponding duty to the public to so carry it on. But while these considerations are pretty generally referred to in these cases, the equity of the principle is nowhere nor in any degree made to rest upon them. To the contrary, they seem to be advanced merely for the purpose of affording a justification—we had almost said excuse—for the application and effectuation in the particular case of an abstract equity resting entirely upon other and altogether sufficient grounds of recognized equitable cognizance, and which needs no other justification or excuse for its application in any case than the existence of the facts upon which it arises and rests.

It may be—probably is—that all which is said in the cases about railroads, and this equity being confined to the property, et cetera, of railroad corporations, comes from a conservative view of the sacredness of the rights of mortgagees as against the subsequently accruing claims of third persons, and is prompted by an apprehension that if the principle is allowed to operate in respect of the property of other corporations, as to which there may not be, from all points of view, the same necessity for its application, it would become an engine of oppression to bondholders and be used in violence to their vested rights and interest. This view is most commendable, but the apprehension is without any reasonable foundation, it seems to us. If the principle is equitable in itself, it can never be used to work injustice or inequity to bondholders, or to anybody else. And that it is inequitable in itself, and without reference to whether the mortgagor [611] corporation is a railroad company or not, is demonstrated by the opinion of Judge Waite in Fosdick v. Schall, 99 U. S. 235, which has been uniformly followed and never doubted, and is demonstrable by every consideration obtaining in the premises.

The doctrine proceeds on the broad principle, which underlies the administration of all law concerning property right, that when one party has property which belongs to another, restitution in some form or another must be adjudged or decreed by the courts upon proper and seasonable application by the party aggrieved. The theory is, to get nearer the case in hand, that the bondholders, or the receiver for them, have property or something of value to which the party invoking the court's aid has a better abstract right, a superior equity. To state the proposition yet more concretely: The equity arises and is rested upon one or another of three following categories or states of fact: 1. That the gross earnings of the corporation before the receivership, to which its operatives and laborers and persons furnishing necessary supplies are upon all the authorities entitled in preference and priority to the bondholders, have been diverted from the payment of their wages and accounts and paid to the bondholders, or are in the hands of the receiver to be paid to the bondholders, or to be expended by him in the further operation of the corporation's works for the benefit of the bondholders, or have been expended either before or after receiver appointed in the improvement and betterment of the mortgaged property, whereby the security of the bonds is increased to the obvious advantage and benefit of the bondholders;

or 2. That whether, strictly speaking, there has been any diversion of gross earnings from the employés directly or indirectly to the bondholders or not, the operatives and laborers have performed services and labor in the improvement and betterment of the mortgaged property, so that such labor and services have inured directly to the benefit of the bondholders in the enhancement of the value of their security, and hence of their bonds, they thereby securing, in addition to the property embraced in their mortgages, the value of the services of the company's operatives and laborers, which value belongs to such operatives and laborers, and would have been paid [612] to them, it is to be assumed, by the corporation out of its gross earnings but for the intervention of the bondholders, and the appointment at their instance of the receiver; or 3. That labor and services have been performed and rendered in carrying on the business of the corporation and keeping it a "going concern," the mortgages and bonds evidencing a contemplation of the parties to them that the operations of the corporation should be kept on foot and going, and a necessity therefor as the means of production of the net income out of which the bonds, principal, and interest are to be paid; that the business has been kept going by the receiver and earnings from it have been realized; that such earnings have been paid to the bondholders, or are held by the receivers, and that the laborers have not been paid for services thus rendered prior to the receivership. The first two categories of fact under which such priority will be awarded are fully stated and the equity of the results flowing from them is fully demonstrated in the opinion of Judge Waite copied above. The third finds ample illustration and support in an opinion of the supreme court of the United States, delivered also by the chief justice, in Burnham v. Bowen, 111 U. S. 776, where it was sought to have the amount due Bowen for coal supplied to a railroad company before the appointment of the receiver made a first charge upon the income of the receivership, and, such income having been paid to the bondholders, to have payment made out of the corpus of the mortgaged property; and it is not questioned that sums due to laborers stand upon the same footing as supply accounts in this connection. In the course of the opinion Judge Waite said: "In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. It is said, however, that as no part of the income, before the appointment of the receiver, was used to pay mortgage interest, or to put permanent

improvements on the property, or to increase the equipment, there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession [613] under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. There is nothing to show that the receiver was appointed because of any misappropriation of the earnings by the company. On the contrary, it is probable, from the fact that the large judgment for the right of way was obtained about the same time the receiver was appointed, that the change of possession was effected to avoid anticipated embarrassments from that cause. But, however that may be, there certainly is no complaint of a diversion by the company of the current earnings from the payment of the current expenses. So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the businesss. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well as that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in Fosdick v. Schall, 99 U. S. 235, the 'current debt fund,' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in Fosdick v. Schall, 99 U. S. 235, which we see no reason to modify in any particular."

And to the same effect, that it is not necessary to the application of this doctrine that there should be, strictly speaking, any diversion of income before the appointment of the receiver, are the opinions of Judge Thompson, expressed in his work on Corporations, and of Judge Caldwell on the circuit bench: 5

Thompson on Corporations, sec. 7118; Farmers' Loan etc. Co. v. Kansas City etc. Co., 53 Fed. Rep. 182.

Enough has, we think, been said by ourselves and [614] through our adoption of the language of Judge Waite to demonstrate that the equity of the doctrine lies solely in the facts that the gross income of the corporation which in good conscience belongs to its laborers and operatives has been, in one form or another, diverted from them and converted directly or indirectly to the use, benefit, and behoof of the bondholders to whom in equity and good conscience it does not belong, whether the mortgages securing the bonds in terms embrace income or not, until the wages of laborers and operatives and the accounts of supply or materialmen for labor done and supplies furnished recently before the appointment of the receiver have been paid. And this is the whole equity, and it is in itself a perfect equity. The fact that the corporation is of a public character does not enter into it and is not an element of it, any more than such fact would be necessary to a recovery in trover for a horse converted by a corporation. Every element of this equity may exist as well against a private as against a public corporation, and against bond creditors of the one as well as the other. The right to be asserted is obviously the same whatever the character in this respect of the corporation. The wrong done to the employés is the same—the misappropriation of the fund for the payment of their wages. And the remedy for the effectuation of the right and the redress of the wrong is applied upon considerations which take no account of whether the corporation whose earnings have thus been wrongfully diverted from the payment of its employés is a railroad company, or a manufacturing company, or a mining company. The diversion of the fund being shown and the equity being thus made to appear, the redress is accorded, the equity is declared and effectuated by courts of chancery upon that broad and beneficent maxim of equity jurisprudence which imposes, or authorizes the court to impose, upon every suitor asking equitable relief the duty and burden of doing equity; and we have not heard or seen it suggested that this principle is applicable more to one suitor than another or more to a public than a private corporation. The necessity for the application of this equitable doctrine, for giving preference to claims of employés for wages, is doubtless more frequent in railroad cases, but that does not argue that the facts which authorize it cannot well [615] exist in other cases. So there is more necessity ordinarily for a railroad corporation

to be kept a "going concern," because of the duty it owes the public and the character of its business, and hence it is true that the facts stated constituting the equity of the doctrine in the third category, supra, exist more frequently in respect of railroad property. But there may well be, from the point of view of the bondholders, as much necessity to keep the works of a private corporation going in order to protect and preserve the property which is the bondholders' security as also to earn income for the payment of current expenses and the principal and interest of the bonds. And the necessity of keeping the corporation a going concern is in all cases gauged, not from the standpoint of the public, but from the standpoint of the bondholders, and for the purpose of determining, not what injury the public would have suffered from the stoppage of the works, nor how they have been benefited by the continuation of the business, but what injury the bondholder would have suffered from such stoppage in the loss of net income and the diminution of the value of the property, with a view to measuring the benefits he has received from the labor of employés in continuing to carry on the operations of the corporation. The damages and loss to the bondholder from a stoppage of the operations of a railroad would generally be greater than from the stoppage of the works of a mining company; but whether greater or less, they stand upon the same footing as a measure of the benefit accruing to him from the labor which prevented their infliction upon him; the difference is one of quantity and not of kind.

We have undertaken to state this doctrine as it has been declared in other jurisdictions, and there applied to railroad property, and to give our reasons on general principles for the conclusion we have reached that that limitation of the doctrine is unsound, and that, of consequence, in our opinion, the equity is as salutary, and its effectuation is as practicable and necessary against the bondholders of private as against those of the public corporations. The argument against this wider application of the doctrine, which is based on the supposed fact that such application has not heretofore been made, is the same argument that stood in the way of the conclusion in Fosdick v. Schall, 99 U. S. 235, and was in that case entirely [616] demolished in respect of railroad corporations and their property; the same argument, indeed, that has had to be met and overthrown in every new application of equitable principles from the beginning, and which, had it been allowed to obtain and control, would have left England and this country without the splendid

system of equity jurisdiction which now embellishes the jurisprudence of both countries. It may be, as suggested, that courts have been very stupid or very much at fault in not making an earlier application of these principles to cases like the present one; but, if so, it is the same stupidity which delayed the declaration of the doctrine of Fosdick v. Schall, 99 U. S. 235, that in the early ages failed to recognize equity jurisprudence at all, and which, upon the eventual establishment of the court of chancery, stood in the way of the immediate development and application of all the principles of equity into a perfect system of equity jurisprudence which has not even yet been attained.

The broader application of the doctrine, which we are attempting to justify on what we regard as very plain and simple elementary principles of equity, will not lead to, involve or admit of any of the dire consequences which are suggested, as will be clearly seen upon reference to the limitations which those principles themselves involve, and which we have endeavored to state with care and precision. It will not take the place of mechanic lien laws and the like, nor obviate the necessity or policy of such enactments. It will not in any sense encroach upon vested or contractual securities or rights. The principles upon which it rests, in the application of it which we are proposing, in and of themselves, mark a distinct line between the particular corporation cases to which it applies and the ordinary cases of mortgages on property, whether of individuals or corporations, to secure the payment of debts; and under it there is not the slightest danger of the secured creditor in any case losing anything which he is entitled to on recognized principles of equity and good conscience.

We have examined all the authorities brought to light in the case, not to speak of the adjudications of this court, and none of them conflicts with our position except in matter of obvious dicta to which we have already referred.

617 We have proceeded thus far and to the conclusion indicated above without reference to or consideration of what has heretofore been said or decided by this court on the subject. Aside from the case of Merchants' Bank v. Moore, 106 Ala. 646, there are two cases in our reports which are supposed to bear upon it. The first is that of Meyer v. Johnston, 53 Ala. 237. In this case it appears that the mortgagor of a railway executed a second mortgage on the property to secure money borrowed for the purpose of making permanent improvements upon it, and this money was so used. Of an effort made by the bene-

ficiaries in the second mortgage to have their claim given a priority over the first mortgage debt, the court, by Manning, J., said: "The claim of the complainants below for the value of the improvements made on the railroad is without just foundation. It would be a case of charging the mortgagee with improvements put on the mortgaged property by the mortgagor; which is wholly inadmissible." The equitable principle of Fosdick v. Schall, 99 U. S. 235, had not been formulated and expounded at the time of, nor was it urged in argument or at all considered by the court in, the decision of Meyer v. Johnston, 53 Ala. 237, nor indeed did the facts there involved present a case for its application. So that we feel entirely warranted in saying that that adjudication is not an authority against the so well established doctrine of Fosdick v. Schall, 99 U. S. 235, and the other cases in that line of authority.

The other case referred to is that of Lehman v. Tallassee Mfg. Co., 64 Ala. 567. In that case the equitable doctrine invoked by these petitioners was not only fully considered by this court, but it was reaffirmed and adopted, and its operation was expressly extended to the property of a manufacturing company then in the hands of a receiver appointed at the instance of the holders of the corporation's bonds which were secured by a deed of trust or mortgage on its property. Brickell, chief justice, delivered the opinion of the court, and, after quoting with approval the following language from the opinion of Judge Waite in Fosdick v. Schall, 99 U. S. 235, viz.: "When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a [618] condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable," went on to say: "The further observation is made in reference to railroad mortgages, which seems to us applicable to mortgages by manufacturing and commercial corporations, generally, that they 'are comparatively new in the history of judicial proceedings. They are peculiar in their character and effect peculiar interest. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions of some parties from their

strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results, almost as a matter of necessity, from the peculiar circumstances which surround such litigation.'" And the chief justice in another connection said further: "The general creditors then before the court, under the circumstances, could properly, for the convenience and interest of all, be required to concede the use of the property belonging to the mortgagor but not covered by the mortgage from their strict legal rights to it, and its immediate reduction to money by a sale; as the mortgagees could be required to concede for their strict legal rights that from the earnings of the mortgaged property outstanding debts for labor, supplies, et cetera, should be paid". Lehman v. Tallassee Mfg. Co., 64 Ala. 596, et seq.

The case of Merchants' Bank v. Moore, 106 Ala. 646, referred to above, goes upon certain dicta of Judge Brewer in Kneeland v. American etc. Trust Co., 136 U. S. 89, which we have already considered, to the conclusion that the doctrine under consideration cannot be applied to other than railroad corporations. That conclusion is, we think, at war with our own case of Lehman v. Tallassee Mfg. Co., 64 Ala. 567; and it appears to have been rendered without consideration, and certainly without discussion, of the broad and beneficent principles of equity which not only support the doctrine in respect of railway corporations but, with [619] equal force, require its extension to all corporations, which, as shown by deeds of trust or mortgages to secure bonds, it is in the contemplation and to the interest of the parties, the mortgagor and bondholders, should be kept going; and this without at all impinging upon the sacredness of the vested rights of the bondholders. We are now of opinion that what is said in that case in limitation of the doctrine to railroads is unsound in principle, and must be modified so as to comport with the views we now announce. And we will return to and reaffirm the decision in Lehman v. Tallassee Mfg. Co., 64 Ala. 567, and upon that, in connection with the general equities to which we have adverted, we do not hesitate to apply the doctrine of Fosdick v. Schall, 99 U. S. 235, to the property of the defendant corporation, though it be only a mining and coke manufacturing concern, now in the hands of the receivers appointed at the instance of the trustee in the deeds of trust, if the petition presents the particular facts which are essential elements of the equity petitioners invoke and rely

upon. To return, then, to the petition: We find no averment in it of any such improvement or betterment of the mortgaged property by the laborers whose wages are unpaid, and to whose claims petitioners have succeeded, as would entitle them to priority over the bondholders. There are averments of repairs to the coke ovens and to the railroad; but mere casual and incidental repairs, such as are implied here, the mere mending a break or defect caused by current use, et cetera, are not improvements or betterments within the rule we are considering. The improvements must be of such character as to add a value in a sense permanent to the property, so that the security of the bonds is thereby increased, before the bondholders can be called upon to make restitution of that value to the laborers.

Nor do we find that a case is made under the third statement of facts supporting this equity above. It is said that the labor was necessary to continue the business of the corporation, but it is not shown either that such continuance was to the advantage of the bondholders, or necessary in conservation of their interests, or that any income, out of which, or because of the receipt of which, the wages for this labor should be paid, had been realized by the receiver from his administration [620] and operation of the business and works of the corporation. Hence no case is made under the third statement above of the facts constituting this equity.

But we do find an averment on information and belief that "there was due to the defendant at and before the time of the appointment of said receiver the sum of about forty thousand dollars, which was due for coal and coke sold by the defendant, and which was taken from said mine and manufactured in said ovens, and that said forty thousand dollars represented the gross earnings of the defendant into which the labor of said employés and operatives entered, and that said employés performed work and labor in the mining of said coal and in manufacturing said coke, and which is referred to in this section." This averment is not objectionable because of being made on information and belief: Christian v. American etc. Mtg. Co., 92 Ala. 130; Lucas v. Oliver, 34 Ala. 626; Nix v. Winter, 35 Ala. 309. It is as definite as to amount as if the language had been "a large sum, to wit, forty thousand dollars," which means about forty thousand dollars, and is a customary and sufficient mode of averring such facts. It is an averment that the company when the receiver was appointed held and owned claims for products sold, bills receivable, for about forty thousand dol-

lars. Prima facie, the parties owing these bills were solvent and the amounts against them were good. It is shown that the receivers were authorized and directed to take into their possession all the property of the corporation, special reference being made to assets of this kind, and that they did take possession of all its property of every kind. It is probable these accounts have been collected, but whether so or not, they or their proceeds constitute the "moneyed assets that have been taken from the company," spoken of by Judge Waite as the class of assets upon which ordinarily the power to give laborers priority of payment over bondholders is exercised. The petition shows that these "moneyed assets" belonged to and were a part of the gross earnings of the corporation. They therefore belonged to the employés in preference to the bondholders. If they are still uncollected in the hands of the receiver, the petitioners are entitled to have their claims charged upon them under the general prayer for relief. If they have been collected and the money is in the hands of the receiver, petitioners are entitled to
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have their debts paid out of it. And if their proceeds have been paid to the bondholders or expended in the administration of the receivership, the claims of the petitioners should be made a charge on the corpus of the mortgaged property, and paid out of the first moneys coming into the hands of the receiver, as specially prayed in the petition.

The claims of the petitioners being for labor done within six months before the appointment of the receiver come within the strictest rule declared by any of the cases as to time: 5 Thompson on Corporations, sec. 7115.

No objection to the relief prayed can be based upon the fact that petitioners claim as assignees of the employés: 5 Thompson on Corporations, sec. 7117.

The petition prays that notice of its filing be given to the parties to the pending suit. This was, in our opinion, sufficient in respect of making parties to the intervention, and the objection in this connection taken by the demurrer is untenable.

Finally, our conclusion is, that the petition made a case for the relief as shown above, and the demurrer to it should not have been sustained. The decree of the city court is, therefore, reversed, the demurrer to the petition as a whole is overruled, and the cause is remanded.

COLEMAN, J., DISSENTED.—"The real issue involved," he said, "is whether the doctrine believed to have been first promulgated in the case of Fosdick v. Schall, 99 U. S. 235, which allowed wages

earned within six months before the appointment of a receiver preference and priority over the bondholders whose debts were secured by a mortgage preceding the accrual of the claim for wages, and which doctrine, by that decision and others since rendered, was expressly limited to public railroads, shall be further extended, and, as extended, be applied to private business corporations, companies, and individual transactions. The principle asserted and the rule adopted for its application in the opinion of the court logically leads to this result. No case has been cited in support of the contention, and the writer believes it is without precedent."

"Is it a fact," he continued, "that the gross income covered by a prior executed mortgage, known to the parties, belongs, in any sense, to the laborer or materialman as a matter of equal or equitable right; and that it does not belong to the bondholder, although by contract he has secured a prior lien, which lien existed, and which the laborer and materialmen knew existed, when the services were rendered and the supplies or material were furnished? Have we discovered or invented a legal X-ray which exposes to the judicial eye an imperfection in the old doctrine of contract on personal credit, or manifests, as unsound, the rule which declares contracts to be sacred and inviolable?

"If the income 'belongs' to the laborer, he ought to be able to recover it in an action for money had and received, and not by a judgment for services rendered. If he or the materialman has a lien upon, or prior claim to, the income, or upon the 'corpus into which the labor or material has entered,' as an 'abstract' and 'perfect equity,' independent of contract or statute, the judicial mind for a century or more has been grossly at fault. The interventions of legislatures to provide for labor and material furnished, and the study and worry of courts to adjust the rights of contractors and prior mortgagees under these statutory enactments, were, to a great degree, superfluous, and labor lost, for, if the doctrine now contended for be sound, there arose from the facts, without the statute, or agreement, a perfect equity, which only needed application and enforcement. If the doctrine now contended for is sound, there must arise on every farm, in every manufactory, mine, and enterprise in which labor is performed and material furnished from which a gross income is derived, the same rights and equity, independent of, and superior to, the claims of all other creditors without regard to previous or subsequent contracts. If the perfect equity exist, the arbitrary limitation, by some courts, to six months within which such claims may be enforced is a tyrannical usurpation by the courts."

The cases of Fosdick v. Schall, 99 U. S. 235, and Kneeland v. American etc. Trust Co., 136 U. S. 89, were cited as showing that the doctrine of the principal case is limited to railway mortgages, and the writer of the dissenting opinion declared that he could not sanction as sound a rule of equity which annuls, or, as usually expressed, "displaces," existing relations between a mortgagor and mortgagee, in the interest of a third party, whose interest was acquired against the mortgagor, subsequent to, and with a full knowl-

edge of, the rights of the mortgagee. "The justification of the courts," he said, "denying a mortgagee his priority, has been rested mainly upon: 1. The equitable doctrine that he who seeks equity must do equity; 2. Upon the equitable doctrine of estoppel; and 3. That the claim is one of abstract right arising from certain conditions and circumstances. As to the first of these propositions, that he who seeks the aid of a court of equity must do equity, the rule operates only between the parties to an agreement or transaction to prevent the one from taking an undue advantage of another, but cannot be invoked by a stranger, who is not even a proper party to the suit. But the argument assumes the question in controversy, and that is that these claimants have an equity peculiar to them because of the character of the claims. These claims must necessarily arise either from contract, express or implied, or from the statute, or result into such superior claims as matter of law from facts. It is not pretended that the right is of statutory creation, or of contract between the parties, the mortgagee and labor or material creditor, nor between the mortgagor as the agent of the mortgagee, and the labor or material creditor.

"Is it a conclusion of law that a mortgagee guarantees to laborers and materialmen that the business of the company or corporation will be conducted on business principles, and the company never become insolvent? Is it a conclusion of law that a mortgagee's lien shall be subordinate to claims for labor and material? Is it a conclusion of law that a lien upon incomes acquired by solemn contract is subordinate to such claims? And, on the other hand, is the right of the laborer or materialman made by law to depend upon the skill and judgment of the employer, so that, if permanent injury results, his claim becomes thereby of a higher and superior character, or does it depend upon how the gross income be expended by the employer? If this be law, it is because the courts make it law, and in no sense is it the application of any just principle.

"Contracts for labor and material, unaided by special provision of the contract, or statute, stand on no higher ground than other simple contract creditors, and are no more entitled to the income than the latter creditors. Labor and material claimants have as much right to have a simple contract creditor, to whom income has been paid, declared a trustee for their benefit, as to have a mortgagee, who has a lien upon it, to whom it has been paid, declared such trustee.

"There is not a single element of an estoppel in the whole matter. Neither the laborer nor the materialman acts, or refrains from acting, at the instance of the mortgagee. It is a question of contract between them and the mortgagor in a matter not under the control or supervision of the mortgagee, and rendered with a full knowledge of the mortgagee's lien. It would require affirmative action on the part of the mortgagee, inducing the labor and purchase, to raise an estoppel against him.

"The new doctrine is a revolution in jurisprudence, subverting settled principles, and not the application of new remedies to existing rights, and it should be walled into the 'exceptional cases' declared

to be such by Mr. Justice Brewer, in Kneeland v. American etc. Trust Co., 136 U. S. 89, and reasserted in Thomas v. Western Car Co., 149 U. S. 95."

The cases of Wood v. Guarantee etc. Co., 128 U. S. 416, 421, National Bank v. Carolina etc. R. R. Co., 63 Fed. Rep. 25, Hanna v. State Trust Co., 70 Fed. Rep. 2, Raht v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456, Coe v. New Jersey Midland Ry. Co., 31 N. J. Eq. 105, Poland v. Lamville Valley R. R. Co., 52 Vt. 144, Thomas v. Western Car Co., 149 U. S. 95, and Kneeland v. American etc. Trust Co., 136 U. S. 89, were then cited to show that the rule of the principal case applies only to railroads, and not to purely private business enterprises, such as manufacturing corporations and the like: Fidelity Ins. etc. Co. v. Shenandoah Iron Co., 42 Fed. Rep. 372; Seventh Nat. Bank v. Shenandoah Iron Co., 35 Fed. Rep. 436. "If the equitable right exist," he said, "as an abstract right, the parties themselves can come into the courts and insist upon its protection, and need not wait for the bondholder or mortgagee." The cases of In re Tallassee Mfg. Co., 64 Ala. 567, and Merchants' Bank v. Moore, 106 Ala. 646, were then reviewed, with the result that it was "impossible to find any conflict" between them "as to any issue involved in either case"; and the opinion in Meyer v. Johnston, 53 Ala. 237, was, as a whole, considered to be in direct conflict with the principle asserted in the principal case. It was said in the principal case that when Meyer v. Johnston, 53 Ala. 237, was rendered, the equitable principle of Fosdick v. Schall, 99 U. S. 235, had not been formulated and expounded, but this was considered to be no argument, for "the same equity existed then, and it was directly repudiated." Besides this, the dissenting justice showed that the opinion in Fosdick v. Schall, 99 U. S. 235, had been rendered when Meyer v. Johnston, 53 Ala. 137, came up on a second appeal.

"It is clear," he said, "from the authorities of this state, and elsewhere, that when the Mary Lee Coal and Railway Company executed its mortgage to the Mercantile Trust & Deposit Company, its mortgage was valid as a conveyance upon all its property, and upon 'income and tolls,' and that the principle of law entered into [it] as a constituent of that contract. That this prior right, acquired by a solemn contract, cannot be displaced in favor of the claims of petitioner subsequently accruing, and which, in the absence of agreement, must be presumed to have been rendered upon the personal obligation of the mortgagor, without impairing the obligation of the mortgage contract, is too clear to admit of controversy. It is the doctrine of all the courts. Even in cases where the rule has been enforced against a prior mortgage, the courts concede that the effect of the application of the rule is to 'displace' prior liens, and the 'displacement' is justified solely upon the ground that courts of equity may demand from the mortgagee, as a condition precedent to relief either in the appointment of a receiver or foreclosure, that he concede or consent to the final payment of the claim of the laborer and materialman, although, by virtue of the mortgage, the lien, in fact and in law, is prior and superior to any claim for labor or supplies, realizing that the priority could not be

adjudicated upon any principle of 'abstract equity.' So apparent was it that the innovation impaired the obligation of contracts, the courts limited the application of the 'condition precedent' to railroads because of their public character, and to 'going railroads,' and where there was a 'diversion' of income. How can it be that the application of assets, whether money or property, to the satisfaction of a mortgage, which, by valid contract known to all parties is a first lien upon it, is a 'diversion' of assets, remains yet to be sustained. There is much force in the position that the public have great interest in railroads, and that no one should be allowed to strike down without warning the public interest. The question is one not simply of debtor and creditor growing out of contract, but of commerce itself. Many states have provided for these conditions by statute, and saved their courts from the imputation of 'court made law': Central Trust Co. v. Thurman, 94 Ga. 735."

In conclusion, it was the opinion of the dissenting justice that the doctrine under discussion could not be applied to such cases as the principal one without violating the sacredness of contracts; that the rule in Merchants' Bank v. Moore, 106 Ala. 646, strictly followed Meyer v. Johnston, 53 Ala. 237; and that it ought to be adhered to. "Certainly," he said, "if there was any conflict between the case of Merchants' Bank v. Moore, 106 Ala. 646, and In re Tallassee, 64 Ala. 567, the same conflict exists between the latter case and Meyer v. Johnston, 53 Ala. 237, and which, if there be such conflict, was virtually overruled, without any reference to it. In my opinion, there is no conflict in any of the decisions previous to that rendered in the case at bar." Head, J., concurred in the above dissenting opinion. In connection with it, and the principal case, the monographic note to Green v. Coast Line R. R. Co., 54 Am. St. Rep. 418, on claims which take precedence over mortgages of railway and like property, may be consulted with profit.

WAGES—PRIORITY OF CORPORATION EMPLOYÉS OVER BONDHOLDERS—RECEIVER.—The doctrine of the principal case, as applied to railway corporations, is discussed in the monographic note to Green v. Coast Line R. R. Co., 54 Am. St. Rep. 418, on claims which take precedence over mortgages of railway and like property, but it is new as applied to other corporations.

ASSIGNMENT—ACTION BY ASSIGNEE.—By statute, in many states, an assignee of a chose in action may maintain an action in his own name: Petersen v. Chemical Bank, 32 N. Y. 21; 88 Am. Dec. 298; Roberts v. Corbin, 26 Iowa, 315; 96 Am. Dec. 146; Jordan v. Thornton, 2 Eng. 224; 44 Am. Dec. 546.

ALABAMA NATIONAL BANK *v.* RIVERS.

[116 ALABAMA, 1.]

NEGOTIABLE INSTRUMENTS, IDENTIFICATION — INDORSEMENT FOR.—The indorsement of a stranger to a draft, made only for the purpose of identifying the payee, is purely an irregular accommodation indorsement.

NEGOTIABLE INSTRUMENTS.—THE LIABILITY OF AN INDORSER IS GOVERNED by the law of the place of the indorsement.

NEGOTIABLE INSTRUMENTS.—ACCOMMODATION INDORSEMENTS, if unexplained, impose a liability on the indorser strictly analogous to the liability upon a regular indorsement.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSER.—Liability of an irregular accommodation indorser is contingent, depending upon due presentment, nonpayment, and notice of dishonor; and if a draft so indorsed was, in fact and in legal contemplation, paid by the drawee, this payment constitutes a complete defense to an action seeking to hold such indorser liable.

NEGOTIABLE INSTRUMENTS—INDORSEMENT—PLEADING.—If, in an action against an indorser of a draft, he, by special plea, sets up as a defense that the draft has been paid by the drawee, a demurrer to such plea, upon the ground that payment was made by mistake, or under such circumstances that the refunding of the amount paid could be legally compelled, and it was in fact refunded, is properly overruled, as such facts constitute proper matter for replication, or could be shown under issue joined on the plea of payment.

NEGOTIABLE INSTRUMENTS—INDORSEMENT.—PAROL EVIDENCE is not admissible to vary the legal effect of an indorsement by showing an agreement, contemporaneously made, that the indorser should not be made personally liable, and that such indorsement was made only for the purpose of identification.

NEGOTIABLE INSTRUMENTS — INDORSEMENT — DEMAND AND NOTICE—WAIVER.—If an accommodation indorser of a bill or note, with knowledge that the usual steps of demand, protest, and notice have not been taken, promises to pay, he fixes his liability to the same extent as if there had been no laches on the part of the holder, and facts which excuse demand and notice, or operate as a waiver of laches in respect to them, are deemed proof of such demand and notice, and allegations of these facts may be proved by showing a waiver of them.

NEGOTIABLE INSTRUMENTS—INDORSEMENT.—PROMISE TO PAY or acknowledgment such as shows that the accommodation indorser assumes a liability to pay a bill or note casts upon him the burden of proving laches in regard to demand and notice, and that he was ignorant of it.

NEGOTIABLE INSTRUMENTS.—PROTEST of negotiable instruments is generally excused, or laches in respect to it waived, by whatever excuses, or amounts to a waiver of, notice of dishonor.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSEMENT—CONSIDERATION.—To fasten liability upon an accommodation indorser of a draft, it is not necessary that any consideration should move directly to him. The contract of such indorsement is supported by the consideration moving to the payee from the person to whom he negotiates the draft.

NEGOTIABLE INSTRUMENTS—EVIDENCE.—PRESUMPTION that a forged draft paid by the drawer upon presentation has

been returned to the indorsee and payment refunded by him arises from his possession of the draft marked paid by his agent, to whom he forwarded it for collection, especially when it is mutilated i the manner used by the drawee to cancel drafts by drawing pen and ink marks through the word "paid."

NEGOTIABLE INSTRUMENTS—PAYMENT OF FORGED DRAFT—RIGHT TO RECOVER AMOUNT PAID.—The drawer of a forged draft, who pays it to a bank to which it has been sent for collection, may, upon discovering the forgery, recover the amount from such bank, if it has not in fact paid the money over to its principal, but has merely credited its account with the amount, and the bank may charge back to its principal the amount credited, and return the draft to it.

NEGOTIABLE INSTRUMENTS.—An irregular accommodation indorser, who, without knowing that the draft indorsed is forged, receives part of the proceeds thereof from the purported payee, in payment of the latter's indebtedness to him, and surrenders his collateral securities therefor, though liable as an indorser, is not liable for money had and received, to the purchaser of the draft.

EVIDENCE — DEPOSITIONS. — OBJECTIONS TO IMPROPER QUESTIONS in a deposition cannot be made for the first time when the deposition including such questions and answers is read to the jury.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSEMENT—EVIDENCE.—In an action by an indorsee against an irregular accommodation indorser of a draft purchased by the indorsee from a person named therein as payee and shown to have been altered and changed and the amount thereof raised before such purchase, evidence to show by whom such indorser was asked to indorse the draft is admissible.

NEGOTIABLE INSTRUMENTS— INDORSEMENT — EVIDENCE.—If, in an action by an indorsee of a draft against the indorser, who sets up the defense of want of demand, protest, and notice of dishonor, there is evidence on the part of the indorsee that the indorser wrote to him promising to pay the draft, but the letter is not produced in evidence, the indorser is competent to testify that he has not so written to the indorsee.

NEGOTIABLE INSTRUMENTS—FORGED DRAFT—COLLATERAL SECURITY—EVIDENCE.—The fact that notes evidencing indebtedness were secured by the indorsement of a third person is admissible to strengthen the evidence of the holder thereof that he gave value for money received for the surrender of the notes, when it is sought to hold him, as for money had and received, on the ground that the money paid him by the maker of the notes was derived from a forged draft.

Action for assumpsit. Judgment for defendant, and plaintiff appealed.

Lane & White and Mountjoy & Tomlinson, for the appellant.

Arnold & Evans, O. W. Underwood, and J. A. Mitchell, for the appellee.

[11] BRICKELL, C. J. This was an action instituted by the Alabama National Bank, appellant, against E. R. Rivers, appellee, to enforce the latter's liability as an accommodation in-

dorser of a check or draft, which had been purchased from the apparent payee upon appellee's indorsement, and which had been raised from two dollars to two thousand dollars between the date of its issue and the purchase by appellant. On February 23, 1892, the Gate City National Bank of Atlanta, Georgia, issued its check or draft on the National Park Bank of New York for the sum of two dollars, payable to the order of Thomas Hall. Subsequently the draft was fraudulently altered by changing the name of the payee from Thomas Hall to M. Gellhorn, and changing the amount from two dollars to two thousand dollars, and punching or cutting the figures "2000" in the body of the draft. The signature was not changed in any respect. On February 25, 1892, Rivers, who was a customer of and well known to the plaintiff, went to the bank with said Gellhorn and, leaving the latter outside, asked the cashier [12] whether he wanted any New York exchange, stating that a friend of his had some and that he would bring him in. Receiving an affirmative reply, he called in and introduced Gellhorn, who produced the draft altered as stated above. The cashier agreed to purchase the draft, and told Rivers to indorse it. The latter at first refused to indorse the draft, saying that he had not come to indorse for Gellhorn, but only to identify him, but finally did so, writing his name under and after that of Gellhorn. The latter then went to the paying teller and received two thousand dollars, less one dollar charged by plaintiff for exchange. Gellhorn was indebted to Rivers at the time in the sum of seven hundred and fifteen dollars, for which he had given security, and, after receiving the money from the paying teller, he immediately returned to the cashier's desk and asked the cashier to count out that amount for Rivers, which was done; the latter amount being paid to Rivers by Gellhorn in the presence of the cashier, and Rivers immediately deposited it to his credit in the plaintiff bank. The draft was sent at once by the plaintiff to its New York correspondent, the National City Bank, indorsed "for collection."

The complaint consists of six counts. The first is in the statutory form of a complaint by indorsee against indorser; the second, third, and fourth declare on the contract of indorsement, reciting the forgery and averring presentment, nonpayment, and due notice of dishonor; the fifth and sixth are the common counts for money had and received and money paid. Besides the general issue the defendant filed many special pleas setting up the defense, in various forms, that the draft had been paid

by the drawee upon presentment, that the defendant had indorsed the draft only for the purpose of identifying the payee, and not for the purpose of incurring any liability as an indorser, and want of consideration.

It will be observed that the defendant at the time of the indorsement was a stranger to the draft, and that his indorsement was not, therefore, a regular indorsement for the purpose of transfer, but purely an irregular accommodation indorsement. There is, perhaps, no subject of law upon which there has been greater diversity of opinion than that of the nature of the liability incurred by such an indorsement. But we need not [13] cite, nor attempt to reconcile, the various and conflicting opinions upon this question. The liability of an indorser is governed by the law of the place of the indorsement, and the liability incurred by the defendant must, therefore, be determined by the law of this state. The question has long been settled in this state, by decisions which have been steadily adhered to and followed, that such indorsements, unexplained, impose a liability on the indorser in favor of the person against whom the indorsement is made, which is strictly analogous to the liability upon a regular indorsement: Marks v. First Nat. Bank, 79 Ala. 562; 58 Am. Rep. 620; Hooks v. Anderson, 58 Ala. 239; 29 Am. Rep. 745; Price v. Lavender, 38 Ala. 389; Jordan v. Garnett, 3 Ala. 610; Milton v. De Yampert, 3 Ala. 648. And since the liability of an indorser is a contingent one, depending on due presentment, nonpayment, and notice of dishonor, if the draft in controversy was in fact and in legal contemplation paid by the drawee to the National City Bank, the agent of plaintiff for its collection, this fact constituted a complete defense to the present suit. If payment was made by mistake, or under such circumstances that the refunding of the amount paid could legally be compelled, and it was in fact refunded, these facts were proper matter for replication, or could, perhaps, be shown under issue joined on the plea of payment. The demurrers to the pleas setting up this defense were, therefore, properly overruled.

But the court below erred in overruling the demurrers to those pleas which set up the defense that the defendant indorsed the draft only for the purpose of identifying Gellhorn, the payee, and not for the purpose of incurring any liability as an indorser. These pleas show that the facts relied on to establish the defense rested in parol only. The defense was, not that the liability incurred was that of a guarantor or surety, as distin-

guished from that of indorser, but that no liability whatever was intended to be, or was, in fact, incurred, because the sole purpose of the indorsement was to serve as a memorandum to enable plaintiff, if necessary, to recall by whom the payee had been identified, and that this purpose was known to the plaintiff. Whether parol evidence is admissible to show that the circumstances attending the indorsement indicate an intention of the indorser to be bound only as a guarantor, surety, [14] or comaker, and not as an indorser, we need not, therefore, decide: See Hullum v. State Bank, 18 Ala. 805; Tiller v. Shearer, 20 Ala. 596. It has long been settled by the decisions of this court that the legal effect of the indorsement cannot be varied by parol evidence of an agreement, contemporaneously made, that the indorser of a note or bill should not be made personally liable for its payment. The specific legal import of the contract evidenced by the defendant's indorsement was, that he would pay the draft if payment should be refused by the drawee upon due presentment, and he should be duly notified of the dishonor; and this import cannot be destroyed and the contract varied, even in a suit between the immediate parties to the contract, by proof that the indorsement was only for the purpose of identification: Day v. Thompson, 65 Ala. 273; Preston v. Ellington, 74 Ala. 139; Tankersley v. Graham, 8 Ala. 251; 3 Randolph on Commercial Paper, sec. 1983. Such pleas, moreover, since they deny the legal effect of the indorsement, that is, deny that it was made in such manner as to be binding on the defendant, should be verified by affidavit: Code 1886, sec. 2676; Tiller v. Shearer, 20 Ala. 597; Bryan v. Wilson, 27 Ala. 208. This ground of objection was not specified in the demurrers, and, therefore, cannot be considered in passing upon them. We have referred to the want of the affidavit only for the purpose of showing that the legality of the testimony as to the circumstances under which the indorsement was made must be referred to the issues under which it was offered, and cannot be considered for the purpose of showing that the liability incurred by the defendant was only that of a guarantor or surety, for which purpose it would have been illegal in the absence of a sworn plea.

The court below gave the general charge in favor of the defendant, and it is earnestly contended by the appellee that the charge was properly given, because the evidence showed affirmatively, and was uncontradicted, that the draft was in fact paid by the drawee, and failed to show demand, protest, and notice.

The liability of an irregular accommodation indorser, when there is a valid consideration to support the indorsement, being, as we have seen, the same as that of a regular indorser, and therefore contingent upon due presentment, nonpayment, [15] and notice of dishonor, in order to charge such indorser these prerequisites to his liability must be proven: Marks v. First Nat. Bank, 79 Ala. 562; 58 Am. Rep. 620. When the indorsement is on a foreign bill of exchange, protest also is necessary to fix the indorser's liability. But it is well-settled doctrine that if the indorser of a bill or note, with knowledge that the usual steps of demand, protest, and notice have not been taken, promise to pay, this, without more fixes his liability to the same extent as if there had been no laches on the part of the holder: Bolling v. McKenzie, 89 Ala. 475; Kennon v. McRae, 7 Port. 175; 3 Randolph on Commercial Paper, sec. 1370 et seq.; 2 Daniel on Negotiable Instruments, sec. 1147. And facts which excuse demand and notice, or operate as a waiver of laches in respect to them, will, in law, be deemed proof of such demand and notice, and allegations of these facts may, therefore, be proved by showing a waiver of them: Manning v. Maroney, 87 Ala. 567; 13 Am. St. Rep. 67. It was furthermore held by this court at an early day that a promise to pay or acknowledgment such as shows that the indorser assumes a liability will cast upon him the double burden of proving laches and that he was ignorant of it: Kennon v. McRae, 7 Port. 175. There is evidence tending to show that on the second or fourth day after the plaintiff had mailed the draft to the National City Bank for collection, the cashier notified defendant of the forgery, and the defendant told him "to rest easy; that we [the bank] would not lose a cent by it; to give him time"; and that subsequently Rivers wrote to the bank "agreeing to pay the money." The defendant testified that the cashier on one occasion told him that if the plaintiff had to pay, it would look to him for reimbursement, and he replied, "Mr. Urquhart, if I have to pay it, it will be mighty hard; but if I have to pay it, I will do it." This was sufficient evidence of a promise to pay to require the submission to the jury of the question of laches in respect to presentment and notice. It is not necessary, in view of this evidence of a promise to pay, to decide whether protest of the draft was necessary in order to charge the defendant, since protest is in general excused, or laches in respect to it waived, by whatever will excuse, or amount to a waiver of, notice of dishonor: Manning v. Maroney, 87 Ala. 567; 13 Am. St. Rep. 67; 3 Ran-

dolph on Commercial Paper, sec. 1148. Hence, if necessary in this case, the [16] question whether defendant had waived the laches was for the jury to determine. The general charge could not, therefore, have been predicated on the want of evidence of demand, protest, or notice of dishonor. Nor could it have been properly based on any want of consideration to support the contract to indorsement. It was not necessary that any consideration should have moved directly to the defendant. The consideration moving to Gellhorn, the payee, was sufficient to uphold not only his promise, but also the contemporaneous contract of the indorser: Marks v. First Nat. Bank, 79 Ala. 562; 58 Am. Rep. 620. There remains to be considered, then, only the question whether the evidence that the draft had been paid by the drawee was so undisputed as to justify the general charge.

The testimony as to what occurred in New York at the time of and subsequent to the presentment of the draft to the drawee is very meager, and leaves to inference many facts which it was certainly in the power of the plaintiff to prove by positive evidence. It appears from the testimony of plaintiff's cashier that when the draft was sent by plaintiff to its correspondent, the National City Bank of New York, for collection, the amount thereof was entered to its credit in that bank, and that a week or ten days afterward it "came back unpaid." When asked directly whether plaintiff was charged with the amount credited to it, he only replied, "The check came back to us, and when it is returned it means it is unpaid." The cashier also testified that "it is the custom of banks in returning or sending back a check to charge it to your account when it is returned to you. It is the custom of banks to return refused checks." The draft, when offered in evidence, had stamped on the back, "Note teller. PAID. Feb. 27, 1892. National City Bank, N. Y.," with pen and ink marks drawn through the words, and there was a peculiar cutting of the paper in the manner usually employed by the drawee bank to cancel a paid draft. Whether the draft was actually presented to the drawee and payment refused, or whether payment was made to the National City Bank and afterward refunded upon the discovery of the forgery and charged back to the plaintiff, does not appear by positive testimony, but must be inferred, if found, from the facts stated and the fact of [17] the possession of the draft by the plaintiff. Conceding the defendant's theory that the draft was actually presented and paid, we think the above testimony, aided by certain presumptions which the law indulges from the facts stated,

was sufficient to raise an issue of fact as to the payment that should have been submitted to the jury. As between the drawee, the National Park Bank, and the National City Bank, holding the draft for collection as the plaintiff's agent, if the former in fact paid the draft to the latter, the payment, assuming the draft to have been raised as alleged, would be treated in law as made under a mistake of fact, and if the latter had not in fact paid the money over to the plaintiff, but had merely credited its account with the amount, it could have been compelled to refund the money to the drawee, and, having refunded it, could have charged back to plaintiff the amount credited: Birmingham Nat. Bank v. Bradley, 103 Ala. 119; 49 Am. St. Rep. 17; National Park Bank v. Seaboard Bank, 114 N. Y. 28; 11 Am. St. Rep. 612; United States Nat. Bank v. National Park Bank, 129 N. Y. 647; 3 Randolph on Commercial Paper, sec. 1486. And whatever it could have been legally compelled to do, it had the right to do without awaiting compulsion. In the ordinary course of banking business, the draft, having been paid, would have been surrendered to the drawee. But we find it in the possession of the plaintiff, stamped paid, not by the drawee, but by the plaintiff's agent for its collection, and mutilated in the manner employed by the drawee to cancel paid drafts. What inferences and legal presumptions arise from these facts? It is well settled that if a note or bill is found in the possession of one who appears to have previously transferred it, the legal presumption is that it has been regularly returned to him and that the title is in him, and the burden of showing the contrary is on the defendant: Anniston Pipe Works v. Mary Pratt Furnace Co., 94 Ala. 607; Price v. Lavender, 38 Ala. 391; Herndon v. Taylor, 6 Ala. 461. Conceding that the drawee paid the draft upon presentment, it could not have been regularly returned to the plaintiff, and the title could not be in the latter, in the ordinary course of business, unless, upon the discovery of the forgery, the National City Bank had refunded the money to the drawee, received the draft in return, charged back to plaintiff the amount credited, and returned the draft to [18] it. The just inference from the facts proven, aided by the legal presumption, is that all these things were done. In the absence, therefore, of proof sufficient to overcome the inference and presumption, the case presented is not different in any respect from what it would have been if the plaintiff had presented the draft directly to the drawee and payment had been refused. It follows that there was sufficient evidence of presentment, nonpayment, protest, if protest was neces-

sary, and notice of dishonor, to justify the submission of these issues to the jury, and that the court below erred in giving the general charge in favor of the defendant.

But we are of the opinion that the evidence would not justify a recovery on the common counts for money had and received and money paid. Rivers is not shown to have had any beneficial interest in the draft, as contended by counsel, and no part of the proceeds of the draft was paid to him by the bank. He was simply a creditor of Gellhorn, having loaned him money and taken mortgages and indorsed notes as security, and was innocent of any connection with, or complicity in, the forgery and fraud practiced by Gellhorn. When the latter received the money on the draft, he paid to the defendant the amount due him—seven hundred and fifteen dollars—taking a receipt in full discharging the indebtedness. The fact that Rivers knew the money was part of the proceeds of the draft, and that it was paid immediately after the cashing of the draft, is of no importance, when it is shown that he had no knowledge that the draft had been raised, and that upon the payment by Gellhorn of his debt, he discharged the same and surrendered the securities held by him. No greater reason can exist for holding him liable for money had and received, or money paid to the extent of the seven hundred and fifteen dollars paid to him by Gellhorn, than would have existed if, instead of being paid directly by Gellhorn, the money had passed through a dozen hands and then been paid to him by an entire stranger to the transaction. His liability is strictly that of an indorser, and not that of one to whom money has been paid under a mistake of fact.

The inquiry in the sixteenth cross-interrogatory to A. W. Hill, as to who was the cashier and assistant cashier of the Gate City National Bank, the drawer, at the time [19] the draft was issued, was irrelevant, and the answer was calculated to work injury to the plaintiff in the minds of any of the jury who may have known the history of the assistant cashier's connection with that bank. It does not appear, however, when the objection to the question was made, and the court cannot, therefore, be put in error for overruling the objection. Inasmuch as the question itself was illegal, the objection, if not made until the deposition was read to the jury, was properly overruled: Louisville etc. R. R. Co. v. Hall, 91 Ala. 112; 24 Am. St. Rep. 863. In view of the issues on which the case was tried, it was competent to inquire by whom the defendant was asked to indorse the draft.

The cashier of plaintiff having testified that defendant had written to plaintiff promising to pay, and the letter not having been produced, it was clearly permissible for the defendant to deny that he had so written. That part of the proceeds of the draft which was paid by Gellhorn to defendant, having been paid to discharge an indebtedness due from the former to the latter, evidence was properly admitted to show that the notes evidencing the indebtedness were secured by the indorsement of a third person, since it tended to strengthen the testimony that defendant gave value for the money paid him.

Let the judgment be reversed, and the cause remanded for further proceedings in conformity to this opinion.

NEGOTIABLE INSTRUMENTS—CONTRACT OF INDORSEMENT—LAW OF PLACE.—The law of Indiana governs as to the liability of an indorser, where promissory notes are made and indorsed in that state: Dunnigan v. Stevens, 122 Ill. 396; 3 Am. St. Rep. 496, and note.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSEMENT—RIGHTS AND LIABILITIES ARISING FROM.—The contract and liability of an accommodation party are, in general, those of surety for the party accommodated. The maker of an accommodation note delivered to the payee to be discounted for his benefit cannot set up want of consideration as a defense against a holder for value: See monographic note to Altoona Second Nat. Bank v. Dunn, 31 Am. St. Rep. 745-757, on the rights and liabilities of makers and indorsers of accommodation paper. An accommodation indorser cannot set up, in a suit against him and his indorsee, that there was an agreement between them, at the time of putting their names on the paper, that such indorsement should constitute a joint and not a successive liability: Johnson v. Ramsey, 43 N. J. L. 279; 39 Am. Rep. 580. See extended note to Credit Co. v. Howe Machine Co., 1 Am. St. Rep. 135-138; Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596; 60 Am. St. Rep. 719. As against a holder for value, an accommodation maker of a note can defend only on the ground of actual payment. The fact that it is made for accommodation, and without consideration is immaterial: Philler v. Patterson, 168 Pa. St. 468; 47 Am. St. Rep. 896, and note.

NEGOTIABLE INSTRUMENTS—WAIVER OF DEMAND, NOTICE, AND PROTEST.—Waiver of notice and protest waives demand and notice: Wolford v. Andrews, 29 Minn. 250; 43 Am. Rep. 201; Baker v. Scott, 29 Kan. 136; 44 Am. Rep. 628. Whether facts and circumstances shown by evidence amount to waiver of demand and notice is a matter of fact to be determined by the jury: Lary v. Young, 13 Ark. 401; 58 Am. Dec. 332. The burden of proving that a promise of a drawer or indorser to pay a draft or note, made after failure to make presentment and give notice of nonpayment, was made with full knowledge of facts is upon the party relying upon such promise as a waiver of presentment and notice: Walker v. Rogers, 40 Ill. 278; 89 Am. Dec. 348, and note; Trimble v. Thorne, 16 Johns. 152; 8 Am. Dec. 302. Waiver of demand and notice on a note need not be in writing, and may be proved by direct evidence, or inferred from expressions and conduct of parties: Hibbard v. Russell, 16 N. H. 410; 41 Am. Dec. 733, and note.

DEPOSITIONS—OBJECTIONS—WHEN SHOULD BE TAKEN. Objection to the manner and form of taking a deposition must be

made at the time the deposition is taken. Such objection cannot be made for the first time at the trial: International etc. Ry. Co. v. Prince, 77 Tex. 560; 19 Am. St. Rep. 795. See Winters v. Winters, 102 Iowa, 53; 63 Am. St. Rep. 428; Strickler v. Todd, 10 Serg. & R. 63; 13 Am. Dec. 649; Donnell v. Jones, 13 Ala. 490; 48 Am. Dec. 59.

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[116 Alabama, 224.[

EQUITY—PLEADING.—A demurrer to a bill in equity confesses only such matters of fact as are well pleaded and not conclusions or inferences of law or fact; and when fraud is averred in general terms, and no facts are alleged constituting the fraud, the court cannot consider the averment in passing upon the demurrer, as such averment is a mere conclusion of the pleader.

ATTACHMENT—PERISHABLE PROPERTY—SALE OF.—Under a statute authorizing the court, on motion, to order the sale, in advance of judgment, of perishable property under attachment, the court has jurisdiction to order the sale of any property subject to attachment, and a sale made under such order vests a perfect title in the purchaser, as against the parties plaintiff and defendant, and all others not having a paramount title or lien.

ATTACHMENT—SALE OF PERISHABLE PROPERTY—COLLATERAL ATTACK.—If property subject to attachment is levied on, and motion is made by either party in a proper manner for an order of sale, on the ground that the property is perishable, the jurisdiction of the court to order the sale attaches, and whatever may be the character of the property, if the court is satisfied that, either by reason of its perishable nature, or because of the expense of keeping it until the termination of the litigation, it will prove, or be likely to prove, fruitless to the creditor, and that the purpose of its original seizure will probably be frustrated, its judgment in ordering the sale is conclusive, until reversed in some direct proceeding, and cannot be collaterally attacked.

EQUITY—CONTROL OF DEBTOR'S PROPERTY—JURISDICTION.—Insolvency alone, in the absence of fraud or collusion, does not authorize a court of equity to take charge of a debtor's property at the suit of his creditor, and to administer it for the benefit of creditors.

Mountjoy & Tomlinson, for the appellant.

W. Percy, for the appellee.

228 BRICKELL, C. J. This is an appeal from a decree sustaining a demurrer to a bill of complaint filed by appellants, creditors of B. Somers & Co., which seeks to have declared void a sale of personal property, which had been seized as the property of said B. Somers & Co. under a writ of attachment sued out by the Berney National Bank, and sold under an order of the court, in advance of judgment, as "perishable property," and purchased at the sale by the Berney National Bank; and to have the latter declared a trustee of said property, or the pro-

ceeds thereof, and compelled to account as such. The property consisted of a stock of dry goods, of the alleged value of fifteen thousand dollars, a complete set of store fixtures, valued at two thousand dollars, and a leasehold interest in the storeroom, valued at fifteen hundred dollars; all of which were bid in and purchased by the bank for the sum of five thousand five hundred dollars.

A demurrer to a bill confesses only matters of fact which are well pleaded, and not conclusions or inferences of law or fact. When, therefore, fraud is averred in general terms, and no facts are alleged constituting the fraud, the court cannot consider the averment in passing on the demurrer, for such averments are mere conclusions of the pleader: Flewellen v. Crane, 58 Ala. 629; Loucheim v. First Nat. Bank, 98 Ala. 524; Fort Payne Furnace Co. v. Fort Payne Coal etc. Co., 96 Ala. 476; 38 Am. St. Rep. 109; McDonald v. Pearson, 114 Ala. 630. Such are the allegations that the purpose of appellee in obtaining the order for the sale of said property was "to buy it at a great sacrifice before other creditors could have an opportunity to bid at the sale," and that "the sale was for the purpose of hindering, delaying, and defrauding creditors of B. Somers & Co."

Eliminating these averments, therefore, and dismissing them from consideration, the only theory that can be offered in support of the bill is, that the property ordered by the court to be sold was not "perishable" within the meaning of section 2958 of the code of 1886 (Code 1896, sec. [220] 549), authorizing the court, on motion of either party, to order the sale, in advance of judgment, of perishable property which had been levied on; and therefore the court had no authority to order the sale, the order and sale thereunder were void for want of jurisdiction, and no title passed to the defendant. This theory would limit the power of the court to order the sale of only such property as contained in itself the elements of speedy decay, such as fruits, fish, fresh meats, et cetera, or such as, from its nature, could be said to be perishable without any evidence to prove the fact, and cannot be sustained without giving to our statutes regulating the subject a construction so narrow as to defeat the manifest purpose intended to be accomplished by the legislature in their enactment, and to defeat also, in many instances, the purpose of the statutes authorizing the remedy by attachment. The purpose of the preliminary seizure of the property of a supposed debtor, before any judgment determining the fact or amount of indebtedness, is to conserve it for eventual execution after the

lien created by the seizure shall have been perfected by judgment. But in many instances the nature of the property and the expense of keeping it to await the termination of the litigation, a period indefinite and often impossible of ascertainment, would render the remedy fruitless to the creditor, if the property should be kept in the form in which it was seized. The statutes authorizing the conversion into imperishable cash of property that would otherwise be destroyed, or would deteriorate greatly in value if kept, were therefore adopted, and their manifest purpose was, as has heretofore been stated by this court, "as well to protect the attaching creditor and give him a fruitful remedy against his debtor, as to protect the debtor and prevent the sacrifice of his property without accomplishing the payment of his debt. Both the creditor and debtor have an equal interest in the sale of the property falling within the scope of the statute, as it pays the debt on the one side, and at the same time it deprives the other of his property. But for this law the debtor would often be deprived of his property, whilst the debt for which the attachment was issued would be left unpaid": Millard v. Hall, 24 Ala. 230. This purpose could not be effected, in the great majority of cases, if the power of the court to order the [230] sale, in advance of judgment, of property levied on should be limited to such property only as was in its nature perishable, containing in itself the elements of speedy decay; for this species of property constitutes but a small proportion of that which is usually levied on. The statute must be given a broader construction if the purpose of the legislature is to be effectuated. In the case cited, the defendant in attachment brought an action of detinue for the recovery of a slave which had been levied on, against the purchaser at a sale which the court had ordered in advance of judgment, on the ground that the property was perishable. It was contended that a slave was not perishable property within the meaning of the statute, and that the order of sale was, therefore, void for want of jurisdiction, and the sale vested no title in the purchaser. The statute then in force was very carefully considered for the purpose of determining what property the court had authority to order sold, and it was held that the power of the court under the statute was broad enough to authorize it to order the sale of any species of property that was subject to levy under a writ of attachment. Gibbons, J., delivering the opinion, said: "Giving to the statute this construction, it will be seen that its terms are quite comprehensive; all

that is necessary to be shown is, that the article levied on is likely to waste or be destroyed by keeping. It need not be shown that it will necessarily waste or be destroyed; but if it be likely to waste or be destroyed, it may be sold—not one particular article, or one species of articles, but any estate attached." And again: "If it is shown that by keeping the article it will necessarily become, or is likely to become, worthless to the creditor, and by consequence to the debtor, then it is embraced by the statute. It matters not, in our opinion, what the subject matter is; it may be cotton bales, livestock, hardware, provisions, or dry goods; if, by keeping them to the end of the litigation, they will prove, or be likely to prove, fruitless to the creditor, he may have them sold, on the order of the judge, according to the statute in such case made and provided." While the statute under which that case was decided was somewhat different in its terms from the present statute, in that it used the words "likely to waste, or be destroyed by keeping," [231] instead of the word "perishable," the reasons given for the construction placed on that statute apply equally to the statute under consideration. Although section 2958 refers, in terms, only to property which is "perishable," section 2959 makes it the duty of the sheriff, in vacation, to sell property levied on, if it be of "so perishable a nature that it will deteriorate greatly in value, or be destroyed, before the meeting of the court, or if the charge of keeping it be very great"; and it cannot be doubted that the power of the court is as great and its discretion as broad, under the one section, as the sheriff's under the other.

It will be seen, therefore, that the subject matter cannot affect the question of jurisdiction to order the sale, when the property levied on is subject to attachment. If the evidence adduced in support of the motion satisfies the court that it will be to the interest of all the parties to sell the property in advance of judgment, this evidence cannot be reviewed, and its sufficiency questioned, in a collateral proceeding, for the purpose of defeating the title of the purchaser at the sale. It necessarily follows that when property subject to attachment is levied on, and a motion is made in the proper manner by either party for an order of sale, on the ground that the property is perishable, the jurisdiction of the court to order the sale attaches, and the validity of the sale, if ordered, cannot be drawn in question collaterally. Whatever may be the character of the property, if the court is satisfied that, either by reason of its perishable nature, or because of the expense of keeping it until the termination of the

litigation, it will prove, or be likely to prove, fruitless to the creditor, and that the purpose of its original seizure will probably be frustrated, its judgment is conclusive until reversed in some direct proceeding. And it necessarily results, also, that a sale made under such an order vests a perfect title in the purchaser as against the parties plaintiff and defendant, and all others not having a paramount title or lien.

The appellants rely on the case of First Nat. Bank v. Consolidated Electric Light Co., 97 Ala. 465, in support of the contention, that a sale of property which is not in fact perishable, although found to be so by the court, is absolutely void; and, in particular, that a sale of a leasehold interest in land, in advance of judgment, is void [232] and vests no title. It is true there is an intimation to that effect in the opinion in that case, but the real point on which the case was decided was, that a leasehold interest in land is not subject to seizure under an attachment sued out by a landlord to enforce his lien, because it is not "goods, furniture, and effects" within the meaning of the statute giving to a landlord a lien for his rent and a remedy by attachment for its enforcement. But the attachment under which the leasehold interest of B. Somers & Co. was levied on is not shown to have been sued out by a landlord to enforce his lien. We may presume, therefore, that appellee was a mere general creditor, like complainants, seeking to collect its debt by the process of attachment; and it may be said that, in general, any property which is subject to levy and sale under execution is subject to attachment. We can conceive of no species of property which will more surely deteriorate in value, pending litigation, and become destroyed and fruitless alike to the creditor and all others in interest, than a leasehold interest in a storeroom. Its destruction is as inevitable as the lapse of time. Its value is the amount it will sell for in the market in excess of the aggregate rental reserved in the lease, and it is self-evident that this amount will diminish day by day until the expiration of the lease, when it will be nothing. If the remainder of the term vested in the defendant should not be longer than the probable duration of the litigation, the levy on it would be futile, if the court had no authority to order its sale in advance of judgment; for after judgment there would be nothing to sell. If, on the contrary, the lease has many years to run after the termination of the litigation, this is a fact that should affect the discretion of the court, and might justify its refusal to sell defendant's interest therein, but would not be ground for declaring

the sale void in a collateral proceeding. But we need not and do not decide this question. If we concede the theory of appellant, that the sale was void for want of jurisdiction in the court to order it, and vested no title to the property in the appellee, yet the averments of the bill do not show any title in complainants to the relief prayed for. If no title passed by the sale, then the title to the property, or right to the proceeds thereof, is in B. Somers & Co., and no facts are averred in the bill sufficient [233] to authorize a court of equity to take the property into its custody and administer it for the benefit of the creditors of that firm. Insolvency alone, in the absence of any fraud or collusion, is insufficient for this purpose: O'Bear Jewelry Co. v. Volfer, 106 Ala. 219; 54 Am. St. Rep. 31.

We find no error in the decree sustaining the demurrers, and it must be affirmed.

PLEADING—DEMURRER—ADMISSIONS BY.—A demurrer admits only such facts as are well pleaded. It does not admit conclusions of fact or of law: Note to Sutherland v. Sutherland, 63 Am. St. Rep. 479; nor do they admit facts which are in their nature improbable or impossible: Southern Ry. Co. v. Covenia, 100 Ga. 46; 62 Am. St. Rep. 312, and note.

RECEIVERS—GROUNDS FOR APPOINTMENT—INSOLVENCY.—A receiver will be refused, where plaintiff's claim to real property is apparently doubtful, and he makes the application merely on the ground of the insolvency of the person in possession: See monographic note to Cortelyeu v. Hathaway, 64 Am. Dec. 484, as to when and over what property a receiver will be appointed.

TROY *v.* ROGERS.

[116 ALABAMA, 255.]

BONDS, FORTHCOMING—MISRECITAL IN.—If a forthcoming bond shows on its face that it was given for the forthcoming of certain property levied upon and claimed as exempt, identifies the contest with respect to the pendency of which it is given, and shows that the obligors bind themselves to the forthcoming of the particular property involved in the contest, it is sufficient as a statutory obligation and in respect to the summary proceedings upon it authorized by statute, and its validity or sufficiency is not affected by the fact that it erroneously recites the levy of an execution upon the property when the levy in question was in fact that of an attachment.

JUDGMENT UNDER FORTHCOMING BOND—CONCLUSIVENESS OF—PARTIES BOUND BY.—If, in a contest of a claim of exemption, a forthcoming bond is executed, an assessment of the value of the property in contest by the court and a judgment sustaining the claim of exemption as authorized by statute are conclusive as against the parties to the suit and the sureties on the bond, no fraud or collusion intervening.

BONDS, FORTHCOMING—FORFEITURE—RIGHT OF ACTION.—If, in a contest of a claim of exemption, a judgment is rendered sustaining the claim, and a forthcoming bond given in the action is returned forfeited, the exemption claimant may have execution issued upon the forfeited bond, or he may sue thereon in a separate action, and he is then entitled to recover as damages the value of the property claimed, as judicially determined in the contest proceeding.

EVIDENCE—JUDGMENT RECORD.—The record of a judgment in a contest of a claim of exemption is admissible in evidence in an action on a forthcoming bond given by the plaintiff in such contest.

Action by R. M. Troy against W. H. Rogers and the sureties on a forthcoming bond executed by him. This bond was given for the forthcoming of certain personal property seized in attachment, for which a claim of exemption was interposed and sustained. Plaintiff appealed from a judgment in his favor assigning as error the ruling of the trial court in refusing to allow the introduction in evidence of the record of the judgment determining the exemption contest.

J. London, for the appellant.

J. W. Bush, for the appellees.

[258] McCLELLAN, J. Section 2532 of the code of 1886 (Code 1896, sec. 2058), is as follows: "When bond has been executed by the plaintiff or the defendant for the forthcoming of the property in contest, the value of the property and the damages resulting from its retention must be assessed by the court or jury trying the contest; and if the unsuccessful party fails for twenty days after judgment to deliver the property and pay the damages, as required by the condition of the bond, it shall be the duty of the sheriff to make due return of that fact; and upon such return being made, the bond shall have the force and effect of a judgment, and execution may issue thereon against the obligors on the bond for the value of the property and the damages assessed, or either, and costs." The bond referred to in this section is that provided by two preceding sections to be given by the defendant—section 2522 of the code of 1886 (Code 1896, sec. 2048)—or, if he fail for five days, et cetera, by the plaintiff—[259] section 2523 of the code of 1886 (Code 1896, sec. 2049)—where personal property has been levied upon, a claim of exemption thereof has been interposed by the defendant in the process, and such claim is contested by the plaintiff in the process. For all the purposes of these several sections, it is immaterial whether the process is a writ of attachment or an exe-

cution upon judgment; the one essential in this connection is that a levy, whether of the one writ or the other, has been made upon the property; the statutes employ only the word "levy." Hence it is that a bond reciting a levy, without more, would be in strict conformity to the statutory requirement and fully show the statutory occasion and consideration for its execution. If, however, it recited the levy of an execution or of an attachment, as might be the fact, it would not, of course, be objectionable therefor. Neither, of course, would it be aided thereby. A question in this case is as to the effect upon such bond, as a statutory obligation and in respect of the summary proceedings upon it authorized by the section quoted, of a misrecital therein of the process levied upon the property in contest; the fact being that an attachment was as levied and the recital being that an execution was levied. We cannot think the misrecital is of any importance. The fact misstated, being of matter of mere inducement to the obligation, and not necessary to be stated at all as inducement or otherwise, is surplusage, and to be disregarded as such. With or without the characterization of the levy as having been made under an execution, and whether such characterization be true or false, the bond fills all the terms of the statute; it shows upon its face that it was given for the forthcoming of certain property levied upon and claimed as exempt, it identifies the contest with respect to the pendency of which it is given, and shows that the obligors bind themselves to the forthcoming of the particular property involved in that contest. It is essentially the bond the execution of which by the plaintiff or defendant forms the basis for an assessment of the value of the property in contest, and the summary proceedings thereon authorized by section 2532.

It follows that the assessment by the city court of the value of the property in contest in and by the judgment sustaining the claim of exemptions was authorized and [260] required by the statute. The value being an issue in that case and therein determined, the parties to the case are bound and concluded by that determination. The sureties on the forthcoming bond given by the plaintiff on the contest, though not strictly parties to the cause, are bound by the judgment equally with their principal, no fraud or collusion intervening; they might have discharged the bond by paying the value so assessed, and the assessment being thus conclusive in their favor must be so also against them. The present plaintiff might have had the bond returned forfeited and an execution issued upon it as a judgment; but

these rights were not exclusive of his right to sue, as he has in this case, on the bond itself, and recover thereon what has been ascertained judicially in a proceeding to which the obligors were parties, or the judgment in which was as binding upon them as if they had been parties to the record, to be the value of the property which the bond required should be delivered to him, but which in breach of the condition thereof has been withheld by the principal in the undertaking.

The city court erred in excluding the judgment in the contest from the jury, and its judgment is reversed. The cause is remanded.

ATTACHMENT — FORTHCOMING BONDS—SUITS UPON—MEASURE OF DAMAGES.—An attachment bond, though voluntary and not authorized by any statute, is good as a common-law bond; all bonds, though voluntary, if they do not contravene public policy, nor violate any statute, are valid and binding on the parties to them: Barnes v. Webster, 16 Mo. 258; 57 Am. Dec. 232. The measure of damages recoverable upon an attachment bond is the actual expense and loss resulting from levying of the attachment, including fees of counsel for services rendered in relation to the attachment: Dickinson v. Maynard, 20 La. Ann. 66; 96 Am. Dec. 379. See Alexander v. Harrison, 38 Mo. 258; 90 Am. Dec. 431.

ATTACHMENT BONDS—ACTIONS UPON—EVIDENCE.—In an action on an attachment bond, the record and proceedings in the original case are competent evidence for the plaintiff: Raver v. Webster, 3 Iowa, 502; 66 Am. Dec. 96, and note.

CAMPBELL *v.* SMITH.

[116 ALABAMA, 290.]

EXECUTIONS ISSUED BY JUSTICE TO ANOTHER COUNTY have no force unless authority is expressly given by statute.

EXECUTION ISSUED BY JUSTICE TO ANOTHER COUNTY.—A statute providing that when a judgment debtor removes to another county, or has property in any county other than that in which the judgment was rendered, execution may be issued by the justice rendering such judgment, "directed to any constable of such county," is mandatory, and an execution issued by such justice in one county, directed to "any lawful officer of said county," and sent to another county to be executed, is void.

EXECUTIONS ISSUED BY JUSTICE — SUFFICIENT AUTHENTICATION.—If an execution is issued by a justice in one county and sent to another county to be executed, the certificate of the probate judge of the county in which the execution issued, indorsed thereon, that the person, naming him, who issued it was an acting justice of the peace for the county in which the judgment was rendered, is sufficient, under a statute providing that such execution "must be certified by the judge of probate of the county in which the judgment is rendered, or by a justice of the county to which it is sent, who has knowledge of the handwriting of the justice issuing it." The latter phrase has reference to the justice to whom the execution is sent, and not to the probate judge.

Davis & Haralson, for the appellant.

[292] HEAD, J. Independent of any statutory provision to the contrary, an execution issued by a justice of the peace has no force outside of the county of the justice. Section 3349 of the code of 1886 (Code 1896, sec. 1936) provides that: "When a defendant in judgment removes to another county, or has property in any county other than that in which the judgment was rendered, execution on such judgment may be issued by the justice, and directed to any constable of such county, which must be certified by the judge of probate of the county in which the judgment was rendered, or by a justice of the county to which it is sent, who has knowledge of the handwriting of the justice issuing it." The next section provides that: "Such execution may be executed by any constable of the county to which it is sent, and must be by him returned to the justice issuing it, as in other cases."

In order to be a valid levy and sale in a county other than that in which the judgment was rendered, there must be a substantial compliance with these provisions.

This case turns upon the validity of an execution issued by a justice of the peace in DeKalb county, by whom the judgment was rendered, and by him sent to a constable in Cherokee county, who levied it upon the land in question, lying in Cherokee county.

There are two objections made to this execution: 1. That it is addressed: "The state of Alabama, DeKalb county. To any lawful officer of said county:" with nothing upon the execution to show that it was to be sent to, or executed in, Cherokee county; and 2. That it was not certified as required by said section 3349 of the code of 1886 (Code of 1896, sec. 1936.)

Under the general statute regulating executions from justices' courts, which are to be executed in the county where the judgment is rendered, it is provided that the writ shall be addressed: "State of Alabama, ———— county. To any lawful officer of the county of ————:" [293] It has been held by this court that this provision was directory, and a failure to conform to it did not render the execution void: Sandlin v. Anderson, 82 Ala. 330.

We are considering now, however, a special provision for the execution of the writ in another county, and find that the statute requires in express terms that it shall be directed to any constable of such other county. We think this is a mandatory requirement. It was not intended that an execution issued by

a justice should be sent to any county in the state, without some designation upon the writ of the particular county whose officers are to be authorized to execute it. The provision is, that when the defendant removes to another county, or has property in any county other than that in which the judgment was rendered, execution may be issued by the justice and directed to any constable of such county. The justice is called upon to ascertain either that the defendant has removed to, or has property in another county, and what county, and then to direct the writ to any constable of the county, so ascertained, and cause it to be placed in the hands of a constable of such county for execution.

Before being sent to Cherokee, the probate judge of DeKalb county certified upon the writ that Lake Moore, the person who issued it, was an acting justice of the peace for said DeKalb county. There was no other indorsement. We think this was sufficient. The clause of said section 3349, "who has knowledge of the handwriting of the justice issuing it," has reference to the justice of the county to which the writ is sent, who is, by the section, authorized to certify the writ, and not to the judge of probate of the county in which the judgment was rendered. Though not expressly decided, this was evidently the opinion of the court as intimated in Street v. McClerkin, 77 Ala. 580.

We are of opinion that the execution was void by reason of the noncompliance with the statute above pointed out, and that the plaintiff acquired no title to the land by the sheriff's sale and deed. Affirmed.

JUSTICE OF THE PEACE—CONSTRUCTION OF POWERS—ISSUANCE OF EXECUTION.—Justices of the peace derive all their judicial powers from legislation. They exercise no common-law powers: Albright v. Lapp, 26 Pa. St. 99; 67 Am. Dec. 402. Nothing is presumed in favor of their jurisdiction: Spear v. Carter, 1 Mich. 19; 48 Am. Dec. 688, and note. Execution issued by a justice, but not returnable according to law, as where it is returnable in sixty days instead of ninety, is absolutely void, and not merely erroneous. It is otherwise with writs issued by courts of general jurisdiction: Stevens v. Chouteau, 11 Mo. 382; 49 Am. Dec. 92. A constable is protected in the execution of process of a justice which shows upon its face that the justice had jurisdiction of the subject matter, when nothing appears to apprise him that he had not jurisdiction of the person: McDonald v. Wilkie, 13 Ill. 22; 54 Am. Dec. 423.

JEFFERSON *v.* BIRMINGHAM RAILWAY AND ELECTRIC COMPANY.

[116 ALABAMA, 294.]

NEGLIGENCE—INJURY TO TRESPASSING CHILD.—The failure of a street railway company to so guard its cars as to prevent a trespassing child, five years of age, from getting on or off, or from being thrown or falling from such cars while being operated and in motion, is not negligence for which the company can be held liable.

NEGLIGENCE—INJURY TO TRESPASSING CHILD.—A complaint alleging that while defendant was operating a dummy line of street-cars, the plaintiff, a boy five years of age, "got upon one of the cars of said dummy line, and defendant, through its servants or agents, recklessly and wantonly, or intentionally, caused plaintiff to leave said car while it was in motion, and, in consequence thereof, plaintiff suffered the injuries and damages" complained of, does not aver actionable negligence.

Action by J. Jefferson, by his next friend, against the defendant to recover damages for personal injuries. The complaint alleged that the defendant operated a line of street-cars without sufficient precaution being taken to prevent children from getting upon them; that on October 9, 1896, the defendant, through its servants or agents, negligently allowed the plaintiff, a boy five years of age, to get upon one of said cars then in operation, without any guardian or other proper attendant, and that such servants or agents wantonly, recklessly, and intentionally caused plaintiff to leave said car while it was in motion, in consequence whereof plaintiff suffered injuries and damages to the extent of twenty-five thousand dollars. The court sustained a demurrer to the complaint and gave judgment for the defendant, and plaintiff appealed.

Bowman & Harsh and C. P. Beddow, for the appellant.

Walker, Porter & Walker, for the appellee.

299 HARALSON, J. The rule in respect to contributory negligence of children has been stated by this court to be, that "a child between seven and fourteen years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity. If the plaintiff is of such tender years that he is conclusively presumed incapable of judgment and discretion, and of owing duty to another, neither 300 contributory negligence on his part, nor that of his parent, can be set up to defeat a recovery": Pratt etc. Co. v.

Brawley, 83 Ala. 374; 3 Am. St. Rep. 751; Government etc. R. R. Co. v. Hanlon, 53 Ala. 70. See also 3 Elliott on Railroads, sec. 1261.

In speaking of the liability for injury to trespassing children, Elliott, in his work on Railroads, says: "In actions for injuries to children, as in other cases, there can be no recovery unless the defendant has been guilty of a breach of duty. There is a sharp conflict among the authorities, however, as to what the duty of a railroad company is to children who come upon its premises as trespassers or mere licensees. We believe the true rule to be that, although the age of the child may be important in determining the question of contributory negligence or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers, or bare licensees not invited or enticed by it, than it is to keep them safe for adults." To sustain this doctrine he cites a long list of authorities from many courts: 3 Elliott on Railroads, sec. 1259.

In Bishop v. Union R. R. Co., 14 R. I. 314, 51 Am. Rep. 386, similar in principle to the one before us, and which, from the frequency of its citation, as well as from its own inherent merits, seems to be a leading case on the subject, the supreme court of that state lay down the doctrine that the owner of property which has been trespassed upon is not liable to the trespasser for an injury arising from the trespass merely because he might by care have guarded against it. Referring to the class of cases relied on by appellant in this case to sustain his complaint—as where defendant's servant left his cart and horse in a public street, unattended, for half an hour, and a boy six years old, who had gotten into the cart and attempted to get out was injured, after another boy had started the horse off: Lynch v. Nurdin, 1 Ad. & E., N. S., 29; or where a child six years old was injured while playing with a turntable of a railroad company: Railroad Co. v. Stout, 17 Wall. 657; or where defendant put a heavy gate on his own land, beside a passway which was used by children going to and from the public road, but left it so carelessly that it fell upon and injured a child between six and seven years old, [301] who shook it in passing: Birge v. Gardner, 19 Conn. 507; 50 Am. Dec. 261; in each of which cases a verdict was sustained against the defendant therein—the court said: "We know of no cases more favorable to the plaintiff than the three cases last cited, but in all three of them the object which caused the injury was a dangerous object left exposed without guard or at-

tendant in a public place of common resort for children. An object so left is a standing temptation to the natural curiosity of a child to examine it, or to his instinctive propensity to meddle or play with it." The court added: "The case at bar differs very much from the three cases previously stated, for in the case at bar the cars, instead of being left unattended, were in the charge of the driver who was in the act of driving them, so that there was nothing done to encourage the trespass, which was merely the result of momentary impulse. Ordinarily, a man who is using his property in a public place is not obliged to employ a special guard to protect it from intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such a vehicle to keep an outrider on purpose to drive such boys away; and that, if he does not, he is liable to any who is injured while thus secretly stealing a ride. In such a case no duty of care is incurred." In support of the doctrine many cases are cited, to which may be added, as being in point, Western Ry. Co. v. Mutch, 97 Ala. 194; 28 Am. St. Rep. 179; Catlett v. Railway Co., 57 Ark. 461; 38 Am. St. Rep. 254; Chicago etc. R. R. Co. v. Stumps, 69 Ill. 409; Hestonville etc. Ry. Co. v. Connell, 88 Pa. St. 520; 32 Am. Rep. 472; Rodgers v. Lees, 140 Pa. St. 475; 23 Am. St. Rep. 250; Daniels v. New York etc. R. R. Co., 154 Mass. 349; 26 Am. St. Rep. 253; Snyder v. Hannibal etc. R. R. Co., 60 Mo. 413; Chicago etc. Ry. Co. v. Smith, 46 Mich. 504; 41 Am. Rep. 177; Railway Accident Law, sec. 75.

From what has been predicated, it will appear that counts of the complaint numbered 1, 2, 3, and 5, were insufficient as charges of negligence against defendant, and were subject to the demurrer interposed to them.

The fourth count was intended to set up that the servants of the defendant willfully or intentionally caused the injury to the child. It not only fails in this respect, but does not even aver any actionable negligence. [302] The defendant's servants had the right to cause the trespassing child to get off the train under proper conditions, and from aught appearing in the count, the conditions were not improper: Haley v. Kansas City etc. R. R. Co., 113 Ala. 640. There was no error in sustaining the demurrer to the count.

Affirmed.

STREET RAILROADS—INJURY TO TRESPASSING CHILD—NEGLIGENCE.—If, seeing a boy upon the car, the conductor calls out to him and makes a movement of a nature to justify the boy in believing that he is about to receive punishment or bodily injury, and he thereupon lets go and falls and is injured, and brings an action for such injury, he may recover, if, in the opinion of the jury, the act of the conductor was done for the purpose of removing the boy from the car, and was improper, unnecessarily dangerous, and the proximate cause of the injury: Ansteth v. Buffalo Ry. Co., 145 N. Y. 210; 45 Am. St. Rep. 607. Compare Hestonville Pass. Ry. Co. v. Connell, 88 Pa. St. 520; 32 Am. Rep. 472; Bishop v. Union R. R. Co., 14 R. I. 314; 51 Am. Rep. 386.

KINNEY *v.* KOOPMAN.

[116 ALABAMA, 310.]

NUISANCE.—KEEPING EXPLOSIVES, such as gunpowder, in large quantities in a public place is not a nuisance per se, without regard to the manner of its use or keeping.

NUISANCE.—DIFFERENCE BETWEEN PUBLIC AND PRIVATE NUISANCES does not consist in any difference in the nature or character of the thing itself, but a nuisance is public when the danger is to the public, and private when the danger is to an individual as distinguished from the public.

EVIDENCE—JUDICIAL NOTICE.—The court does not know judicially that a powder magazine may not be so constructed and provided as to insure absolute safety from lightning.

NUISANCE.—Storing and keeping gunpowder and dynamite in large quantities near dwellings in a thickly settled portion of a city, and near a public street, is not a nuisance per se. To constitute such keeping a nuisance and impose liability for an accidental explosion there must be negligence in "keeping" or in the "manner" of keeping and storing the gunpowder.

NUISANCE—STORING GUNPOWDER—LIABILITY.—Storing and keeping large quantities of gunpowder and dynamite in a "wooden building" in a populous place in a city is prima facie a nuisance, and imposes a liability for an explosion thereof without specifically alleging negligence in keeping and storing it.

EXPLOSIVES—LIABILITY FOR.—KEEPING GUNPOWDER stored in a city in violation of a statute imposes a liability in favor of a person damaged in consequence of such violation, if the latter was one for whose protection the statute was intended.

Lee & McMaster, for the appellant.

G. H. Parker and J. M. Falkner, for the appellees.

317 COLEMAN, J. The material questions are the same in both of these cases, and probably it would have been better had both been submitted together as one. Section 4093 of the Criminal Code of 1886 reads as follows: "Any person, who keeps on hand, at any one time, within the limits of any incorporated city or town, for sale or for use, more than fifty pounds of gunpowder, must, on conviction, be fined not less than one hundred

dollars." In some of the counts of the complaint, it is averred that the defendants kept stored within the corporate limits of the town of Cullman more than fifty pounds of gunpowder, which exploded and caused the destruction of plaintiff's property, but neither of the counts show that the cause of action was founded upon the statute. Other counts aver the storage of just fifty pounds, while in others the averment is that large quantities and dangerous quantities of dynamite and gunpowder were so kept and stored. In some of the counts it is alleged that defendants negligently kept large quantities of dynamite and gunpowder in a wooden building in the town of Cullman, or near other buildings, et cetera. The assignments of error raise the question of the common-law liability of a person who keeps in store, in a town or city, large quantities of explosive material, such as dynamite and gunpowder, for damages resulting from its explosion, and also his liability for damages, resulting from a violation of the statute. We have no [318] statute declaring the storage of gunpowder or explosives in cities or populous places to be a nuisance, and the question must be determined by common-law principles. At common law, "a public nuisance signified anything that worketh hurt, inconvenience, or damage to the king's subjects": 1 Russell on Crimes, sec. 317; 3 Blackstone's Commentaries, sec. 216; 2 Bouvier's Institutes, 503; 2 Bouvier's Law Dictionary, 248; 2 Hawkins Pleas of the Crown; Ferguson v. Selma, 43 Ala. 398. Probably as comprehensive and correct a definition as any may be found in the sixteenth volume of American and English Encyclopedia of Law, page 293, where it is said: "The term 'nuisance' in legal phraseology is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt, that the law will presume a consequent damage." It will be observed that this definition is broad enough to embrace public and private nuisances, and such as are nuisances per se, as well as those which become such by reason of the manner and character, or the place of the use. The distinction between nuisances which are such per se, and those uses which become nuisances by reason of the manner and character of the use, or the place, have always been recognized in well-considered cases: Ogletree v. McQuaggs, 67 Ala. 580; 42 Am. Rep. 112; Rouse v.

Martin, 75 Ala. 510; 51 Am. Rep. 463; Kingsbury v. Flowers, 65 Ala. 479; 39 Am. Rep. 14; St. James Church v. Arrington, 36 Ala. 546; 76 Am. Dec. 332; English v. Progress Electric etc. Co., 95 Ala. 259. The distinction is clearly stated in the case of the Earl of Ripon v. Hobart, 1 Coop. Sel. Cas. 333, 3 Mylne & K. 169, by Lord Brougham: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial. But when the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere." This construction is in accordance with the common law, that "a nuisance per se is that which worketh hurt," or as defined in the Encyclopedia, "working such an effect upon the right of another that the law will presume a consequent damage." [319] Unless the thing, of itself because of its inherent qualities, without complement, is productive of injury, or, by reason of the manner of its use or exposure, threatens or is dangerous to life or property, it cannot be said to be a nuisance per se at common law. If an occupation be lawful, and by care and precaution it can be conducted without danger or inconvenience to another, the occupation is not per se a nuisance, and if such an occupation or business becomes a nuisance, it is because of a want of proper care or precaution.

In 7 American and English Encyclopedia of Law, 517, it is said: "As a general rule, the true and only ground of liability for damage caused by an explosion occurring while the party sought to be charged is in the lawful possession or use of the thing exploding is the want of ordinary care and skill." In the note to this page, it is said: "'Ordinary care and skill' is a relative term exacting a decree of vigilance and technical knowledge in proportion to the dangerous character of the substance dealt with, and requiring that a person shall take for the safety of others whatever precautions the nature of his employment suggest": Citing Thompson on Negligence, c. 1, secs. 11-13. The question of care and diligence does not arise in a case of damages resulting from nuisance per se, because the thing itself was unlawful. Courts have not always been careful to maintain the difference in cases where suit was brought to recover damages resulting from a cause that is a nuisance per se, and damages resulting from the manner of the use of the thing. The rule of "sic utere" requires a person to so use his own as not to injure another, and he is responsible for the failure to do so,

whether the "thing" used be a nuisance per se, or made so by its use. The reasoning is not sound that concludes "a thing" to be a nuisance per se, because in its use injury has resulted. The blasting of rocks is not per se unlawful. But when a person undertakes to blast rocks, whether in a city or in the country, he may become responsible for the damage inflicted upon the person or property of others: this, not solely because of the explosive material used to effect the blasting, but because of the damage resulting from the means used and place and manner of using. A person who would cut a tree down with an ax, standing on his own right of way, so [320] as to fall upon the house of another, would be responsible and equally liable as if a huge rock had been thrown by blasting upon the house. So a city or person may be liable in damages for a nuisance, by causing water to leave its natural course, and overflow the lands of another, but this does not argue that water per se is a nuisance, but only that the manner of its use may become such. The result does not conclusively determine that the means or instrument used was dangerous, but may show that on account of the place and the manner of use, it was such.

It has been frequently held that the law as to explosives is the same as that which applies to keeping dangerous and vicious animals. A dog, however vicious, may be secured so as to render it absolutely harmless. A dog thus kept on one's own premises is not a nuisance per se, because it cannot work a hurt to another. If, however, the dog escapes, and, upon the highway or upon the private premises of another, commits an injury, the owner is liable. Every menagerie or zoo having dangerous and wild animals for exhibition, however securely caged, would be guilty of a nuisance per se if the mere having such animals in cities or on the highway constituted a nuisance. Steam is dangerous, and at times, suddenly, without warning, there are explosions from steam, causing destruction of property and death. If the fact that explosions do occur, causing damage, was conclusive that steam power was a nuisance per se, manufacturing in towns and near other people's premises must cease. Under such rule, all steamboating and railroading would be a nuisance per se.

Is gunpowder kept in large quantities in public places dangerous, and per se a nuisance, without regard to the manner of its use or keeping? When we consider the vast number of government magazines in this country and throughout the world, its daily transportation by every known power of conveyance, its

daily use by millions of persons in war or for blasting, or for amusement, with scarcely a single well-authenticated instance of spontaneous combustion, it cannot be said that gunpowder per se is dangerous. The difference between a public nuisance and a private nuisance does not consist in any difference in the nature or character of the thing itself. It is public because of the danger to the public. [321] It is private only because the individual, as distinguished from the public, has been or may be injured. Public nuisances are indictable. Private nuisances are actionable, either for their abatement, or for damages, or both. If the storing of gunpowder so near another's dwelling in the country, where there is no other building, that an explosion would damage the owner, be not a private nuisance per se, the storing of the powder in a city will not be a public nuisance per se. The decisions of the supreme or appellate courts of different states are not uniform in their statements of the law. We will refer to a few of the leading cases.

The case of Laflin Powder Co. v. Tearney, 131 Ill. 322, 19 Am. St. Rep. 34, at first reversed, and on rehearing affirmed, shows that the complaint was not demurred to, and it was held that the first count which averred the keeping of the powder magazine, its explosion, and consequent damages, contained a sufficient cause of action to support a judgment. The court held that this count showed that the defendant kept a powder magazine "upon its premises so situated with reference to the dwelling-house of the plaintiff that it was liable to inflict serious injury upon her person or property in case of explosion. It was a private nuisance, and therefore the defendant was liable whether the powder was carefully kept or not." The second count charged that the powder was kept in violation of a city ordinance. The court held that the keeping of the powder was an illegal act, and "the defendant was responsible for all consequences resulting from the act."

The case of McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508, was a case where the defendant had collected a magazine of explosives to be used for blasting, within the city limits of Jersey City. A statute of the state had declared the keeping of explosives within the limits of a city in larger quantities than a specified amount to be a misdemeanor. In discussing the question generally, the court stated that the keeping of gunpowder in large quantities in the vicinity of a dwelling-house to be a nuisance per se.

The case of Cheatham v. Shearon, 1 Swan, 213, 55 Am. Dec.

734, was a case where a powder-house was [322] erected in a populous part of the city and which was exploded by lightning. The court held "that the erection of a powder magazine in a populous part of a city, and keeping stored therein large quantities of gunpowder, is per se a nuisance." The court uses the following argument: "The fact that it is liable to explode by means of lightning, against which no human agency could guard, is decisive of the question. If the explosion could only be produced by human agency, there would be much force in the reasoning of the majority of the court (in People v. Sands, 1 Johns. 78, 3 Am. Dec. 296), that the question whether it was a nuisance or not depends upon the manner in which it is kept, because there might be a building so secure and a method of keeping it so careful as that danger would not be apprehended," et cetera. If the conclusion of the court had been that the powder-house in question was so constructed that it was liable to be exploded by lightning, and the fact that it was so exploded was conclusive that it was not properly constructed, there would be "much more force in the reasoning of the court." But when the court undertakes to declare that it is impossible to protect a powder-house from lightning, and bases its conclusion that a powder-house in a populous city is a nuisance per se from such a premise, we are not prepared to assent without some further reason. We do not know judicially that a powder magazine may not be constructed and so provided as to insure absolute security from lightning. We do not think the criticism upon the argument of chief justice Kent is well maintained.

In the case of Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 52 Am. St. Rep. 890, it was declared that the "manufacture and keeping of quantities of gunpowder, nitro-glycerine, and other explosives in, or dangerously near to, public places, such as towns or highways, is a public nuisance and indictable as such. Negligence is no material element," et cetera. It will be observed that "manufacturing and keeping of large quantities of gunpowder" was declared to be a nuisance. It was a manufactory of powder as well as the keeping of powder that exploded in this case. We will not discuss the question of the manufacturing of explosives, and refer to the case for the purpose of considering some of the statements and propositions of the court. It is [323] said: "Now, if this mill were located in a secluded place, and removed from highways, being in itself a lawful business, the case would be different; it would not be a public nuisance, and to recover injury from an explosion, I ap-

prehend, the plaintiff must show negligence on the defendant's part." If the thing be a nuisance per se, and injury results to another's premises, no rule of law requires evidence of negligence. A private nuisance per se is actionable as much so as a public nuisance. The only difference is, that in order to maintain an action in his individual name, he must show an injury not common to others. Whatever constitutes a public nuisance as to the public will constitute a private nuisance, if established so as to have the same effect upon the premises or health of a private person as it would have upon the public, if established in a city or highway. The constituents and definitions of a nuisance, whether public or private, are the same. It becomes a public or private nuisance as it affects the public, or the individual only, but we do not see how the fact that the "place" is public can determine the "thing" to be a nuisance per se. Certainly the place does not bring it within the common-law definition. The opinion, referring to the case of People v. Sands, 1 Johns. 78, 3 Am. Dec. 296, says later New York cases have overruled it. We presume the court referred to the case of Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, and Meyers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744, as these are the only New York cases cited. The case of Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, has been cited in most of the decisions which hold that a powder magazine erected in a public place, or near the premises of another, in which powder is kept, is a nuisance per se, as supporting that proposition. We do not fully and clearly apprehend all the principles intended to be laid down as applicable to the facts in the case of Heeg v. Licht, 80 N. Y. 579; 36 Am. Rep. 654. It was admitted that the defendant had gunpowder stored in his magazine, that it exploded and caused the damage to the buildings of the plaintiff. The trial court instructed the jury that plaintiff could not recover unless they found that the defendant "carelessly and negligently kept the gunpowder on his premises." It was held on appeal that "this charge was not warranted by the facts." The trial court refused to instruct the jury "that the powder magazine was dangerous [324] in itself to plaintiff and his property and was a private nuisance," et cetera. On appeal, it was held that this charge was properly refused. The case then is this: The defendant stored gunpowder and other explosives in a magazine in such quantities and close contiguity to the building of the plaintiff, that an explosion was liable to damage and did damage the plaintiff and his property. On these undisputed facts

it was held on the one hand that the facts did not warrant the court to charge the jury that plaintiff "could not recover unless he showed negligence," and on the other, that these facts did not show that "the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance," et cetera. As we read the case, it was disposed of in the following proposition: "The keeping or manufacturing of gunpowder or of fireworks does not necessarily constitute a nuisance per se. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar, it should have been left for the jury to determine whether, from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance," et cetera. Certainly nothing can be found here which authorizes, as a legal conclusion, from locality and quantity, only, that storing of gunpowder is a nuisance per se. There must be "other surrounding circumstances," and it depends upon the facts of the case whether the party is guilty of maintaining a nuisance.

In the case of Cosulich v. Standard Oil Co., 122 N. Y. 118, 19 Am. St. Rep. 475, the damages resulted from an explosion petroleum. The court held that the business of the defendant was lawful, and that it was incumbent upon the plaintiff to show a want of due care.

In the case of Walker v. Chicago etc. Ry. Co., 71 Iowa, 658, the damages resulted from an explosion of dynamite then on a car in defendant's yard. The evidence showed that the dynamite exploded and injured the property of plaintiff. It was held that the burden was on plaintiff to show that the place where stored was an improper place.

The case of Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146, [325] was for the recovery of damages resulting from an explosion of dynamite and nitro-glycerine stored in a magazine. The complaint averred negligence, and upon the issue thus made, the trial was had. There was expert evidence tending to show that by the exercise of proper precaution an explosion could be avoided. An important rule laid down by the court is, that proof of the explosion raises, prima facie, a presumption of negligence and places the burden upon the defendant to overcome it. There are many citations in the notes to the report of the case in Judson v. Giant Powder Co.,107 Cal. 549; 49 Am. St. Rep. 146.

In the case of People v. Sands, 1 Johns. 78, 3 Am. Dec. 296, the defendant was indicted for a nuisance for keeping fifty barrels of gunpowder near the dwelling-houses of divers good citizens and near a certain public street in the city of Brooklyn, et cetera. The indictment was held bad, for the reason that it failed to charge that the gunpowder was negligently or improvidently kept. All the authorities which have referred to this case expressly or impliedly concede that it decides that the keeping of gunpowder in large quantities in a public place in a city, is not a nuisance per se. The West Virginia case cited above says it was overruled by later New York cases. We have been unable to find the cases overruling it. The Tennessee case, supra, criticises the opinion of Chief Justice Kent, holding that the indictment was bad. In referring to the case decided by Holt, C. J., while stating that it had been loosely reported, Chief Justice Kent first quoted the principle decided, and then used the following language: "This case, as far as it is any authority, goes in confirmation of the principle that the time, place, and manner are all important and essential in determining whether a powder-house amounts to a nuisance."

The case of Meyers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744, has been cited as not sustaining the case of People v. Sands, 1 Johns. 78; 3 Am. Dec. 296. Our reading of the case is different. We think it not only approves of the principles announced, but cites it as authority. In the case of Meyers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744, the action was for damages resulting from an explosion of six hundred pounds of powder in kegs in the upper story of a wooden building, near several wooden buildings, some of which were inhabited. On the trial, it was left to the jury to determine [326] "whether the conduct of the defendants in regard to the manner of depositing the powder was such as to render them guilty of a public nuisance." And, further commenting, it was the opinion of the court that "the most satisfactory position for the plaintiff, and the one most difficult to be answered by the defendants is the ground that the depositing and keeping of the powder in the *exposed situation* [we italicize] described by the witnesses amounted to a public nuisance." Says the court: "Upon the facts disclosed in this case, it cannot be doubted that the gunpowder was deposited in a building insufficiently secured and protected, and altogether unfit for the safekeeping of so large a quantity of the article." This opinion certainly gives no support to the position that the storing of gunpowder in a public

place is per se a public nuisance. The case is directly in support of the principle that the "time, place, and manner" are important and essential in determining whether a powder-house amounts to a nuisance, and accords with the rule declared in Heeg v. Licht, 80 N. Y. 579; 36 Am. Rep. 654.

The case of Bradley v. People, 56 Barb. 72, referred to in some of the decisions as supporting the proposition that the keeping of gunpowder in large quantities in populous places is a nuisance per se, to our understanding of the decision is an authority to the contrary. This decision not only cites People v. Sands, 1 Johns. 78, 3 Am. Dec. 296, and Meyers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744, as authority, but the decision itself is rested upon these two cases. Says the court: "The careless and improper manner of building and continuing the powder-house and keeping the powder therein are fully charged"; and that was the real issue tried. This case was reversed, because the trial court admitted testimony for the prosecution to show in what manner the government magazines were constructed. In commenting on this testimony the court used the following language: "And if it was intended to show that it was the duty of the defendants to build theirs in the same way, it was incompetent; for to hold that all dealers in gunpowder who have occasion to keep it in quantities are bound to construct their storehouses for that purpose in the same way that is deemed necessary in forts and arsenals, woud virtually interdict the traffic in the article by private persons, who could not afford the expense necessary to comply with any [327] such requirement. With the selection of a suitable location I think a much less expensive warehouse would be sufficient. The court below doubtless admitted the testimony because it was thought to be material, and that it would aid the jury in determining the question of negligence on the part of the defendants, and it may have had that effect. At all events, I cannot see that it did not affect the result."

It seems clear that in New York the case of People v. Sands, 1 Johns. 78, 3 Am. Dec. 296, is adhered to as sound law.

In the case of Regina v. Lister, Dears. & B. C. C. 209, decided in 1857, the question is discussed at some length. The defendant was indicted for a public nuisance. The indictment charged that the defendant "unlawfully, knowingly, and willfully did deposit in a warehouse near to divers streets and highways and dwelling-houses, et cetera, large and excessive quantities of a dangerous, ignitable, and explosive fluid, called wood

naphtha, ... and did keep the said fluid in such large, excessive and dangerous quantities, whereby the queen's subjects passing along the said streets and highways and residing in said dwelling-houses were in great danger of their lives and property," et cetera. This indictment was held good. It was shown that wood naphtha was more dangerous and explosive than gunpowder. This case more directly supports the proposition that the keeping of gunpowder in large quantities in a populous place is a nuisance per se than any other English authority we have been able to find. The court used the following language: "Upon the trial of such indictments, we consider that it is a question of fact for the jury, whether the keeping and depositing, or the manufacturing, of such substances, really does create danger to life and property as alleged—and this must be a question of degree, depending on the circumstances of each particular case. No general rule of law can be laid down beyond this, that the substantial allegations in the indictment must be substantially proved. In the present case, we think that sufficient, although not necessarily conclusive, evidence was adduced, and that although the judge would not have been justified in directing a verdict of guilty to be entered without taking the opinion of the jury upon it, he was fully justified in telling the jury (which he appears to have done) that if [328] the depositing and keeping the naphtha in the manner described, coupled with its liability to ignition, ab initio, created a danger to life and property to the degree alleged, they might find a verdict of guilty." The predominant principle declared in the opinion is, that "the substance must be of such a nature, and kept in such large quantities, and under such local circumstances, as to create real danger to life and property."

In the older edition of Russell on Crimes, section 321, the following language is used: "*It seems* [we italicize] that erecting gunpowder mills, or keeping gunpowder magazines near a town is a nuisance by the common law, for which an indictment or information will lie." In the International edition of Russell on Crimes, the phraseology is changed, and the author is made to say: "Erecting gunpowder mills, or keeping gunpowder magazines near a town is a nuisance by the common law, for which an indictment or information will lie." We are of opinion that the author himself knew and weighed the effect of words, and used those which conveyed his exact meaning. An examination of the cases cited to the text shows that the principle was recognized that trades which were necessary and lawful of them-

selves were not to be interfered with by indictment or information unless they come within the definition of a public nuisance. Dealing in gunpowder was a lawful business. Being a lawful business, the question was, whether the keeping of gunpowder in populous places or near highways was an indictable offense under any circumstances.: One of the earliest cases reported was that of Rex v. Taylor, 2 Strange, 1167, where, "upon affidavits of the defendant keeping great quantities of gunpowder, to the endangering the church and houses where he lived, an information was granted." This is the entire report of the case. What the evidence showed, or the result of the case, is not reported. The affidavit was the keeping of the gunpowder to the endangering of the church and houses. No doubt the information was properly granted, and, if the proof showed it was so kept as to endanger "the church and houses," it was a nuisance. Another case was that of Rex v. Williams, in which the defendant was convicted of a nuisance for keeping four hundred barrels of gunpowder near the town of Bradford. How this powder was kept is not [329] stated. Upon these cases, for they are the cases cited to support the text, Russell on Crimes announced the proposition: "It seems that erecting gunpowder mills or keeping magazines near a town is a nuisance at common law"; and this view of the principle is emphasized in the case of Crowder v. Tinkler, 19 Ves. 617. In the latter case, an injunction was prayed for. The court ascertained, from an ex parte investigation, that the defendant might keep as much as twelve hundred pounds safely, for the demands of trade, and made an order allowing this quantity to be kept, until a trial could be had by a jury. It is important to notice the real issue he submitted to the jury. It was not merely whether the defendant manufactured or stored large quantities of gunpowder in the place where it was charged to have been done, upon which the court would pronounce as a conclusion of law that such use would be a nuisance per se, but the jury were required to determine the question of danger. And in the case of Regina v. Lister, Dears. & B. C. C. 209, the direct question arose as to whether the finding of the jury should be limited merely to the keeping of the explosive as charged, or should further find that such keeping was dangerous, and it was held that, under proper instructions, it devolved upon the jury to determine not only the fact of keeping the explosive, but whether the facts showed such keeping was dangerous to property or life. These cases are in line with the rule declared in New York and in other courts;

and that is, that when gunpowder is so manufactured or stored as to endanger life or property, such use is a nuisance. Whether it is so or not is a question of fact, dependent upon the "place, manner, and surrounding circumstances," to be ascertained by the jury.

In Wharton's Criminal Law, section 2376, it is said: "The mere keeping of a large quantity of gunpowder in a house, near dwelling-houses and a public street, does not constitute a nuisance; but keeping it negligently and improvidently does."

In Wood on the Law of Nuisance, section 140, it is said: "In determining the question, the locality, the quantity, and the manner of keeping will all be considered, as well as the nature of the explosive, and its liability to accidental explosion"; and as supporting the general principle, the cases of People v. Sands, 1 Johns. [330] 78, 3 Am. Dec. 296, Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744, and Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, are cited as authorities.

The question came before the court in the case of Dumesnil v. Dupont, 18 B. Mon. 800, 68 Am. Dec. 750, upon a bill filed to abate the keeping of a powder-house in which large quantities of powder were kept. The answer of respondents averred that "their magazine is well constructed, and is protected against accidents by secure fencing, lightning rods, and by the constant presence of a trusty man; that it stands in a sparsely settled neighborhood," et cetera. These statements were proven. The evidence was conflicting as to the effects of an explosion. The question upon which the case was determined was, whether the keeping of the powder-house, in which large quantities of powder were stored, was a nuisance per se. Referring to the opinion of Chief Justice Kent in the case of People v. Sands, 1 Johns. 78, 3 Am. Dec. 296, the court declared that "the point had been conclusively settled by very high judicial authority." The further statement is made, "that the only adjudged case we have met with in which the principle seems to have been differently settled is that of Cheatham v. Shearon, 1 Swan, 213," 55 Am. Dec. 734, and it declared that "the principles and reasoning upon which the decision rests are opposed to the unbroken current of modern authority, English and American, upon the subject."

In the case of Wright v. Chicago etc. Ry. Co., 27 Ill. App. 200, after discussing the liability of parties for damages resulting from keeping explosive materials, the court uses the following language: "We are content with the rule, that the keeping

of explosives unsafely guarded, in such quantities as to be dangerous to persons and property, near a frequented street, or other public place, or in the vicinity of the residences or places of business of others, under circumstances that threaten calamity to the person or property of others, the consequences thereof being an explosion of such articles which causes damage to the person or property of another, gives the latter a right of action to recover from the person keeping the explosive such damages as would not have happened in their absence": Citing Myers v. Malcolm, 6 Hill, 292; 41 Am. Dec. 744; Cooley on Torts, 607.

In the case of Cook v. Anderson, 85 Ala. 99, the court [331] used the following language: "Keeping explosive substances in large quantities in the vicinity of dwelling-houses or places of business is ordinarily regarded a nuisance, whether so or not being dependent upon the locality, the quantity, and the surrounding circumstances." What was dependent "upon the locality, the quantity, and the surrounding circumstances"? There is but one answer, and that is, whether "the keeping of explosive substances in large quantities in the vicinity of dwelling-houses or places of business" was a nuisance. Again the terms, "the locality, the quantity, and the surrounding circumstances," are identical with those used in Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, and no doubt were taken from it or from Wood on Nuisance, section 140, and used in the same sense.

This question came before us again in the case of Collins v. Alabama etc. R. R. Co., 104 Ala. 390, where the principle is stated as follows: "The fact that defendant had in its warehouse twelve hundred pounds of powder is not, of itself, such evidence of negligence as entitles the plaintiff to recover. While it may be said that the keeping of large quantities of explosive material in a building in a populous town or city may be a nuisance, yet the fact that it is such or not must depend on the locality, quantity of material stored, and the circumstances. Negligence in keeping it, or in the manner of its keeping, is requisite to impose a liability to answer in damages, for injuries caused by an accidental explosion of fire."

After a most careful examination of the common-law textbooks and decisions, we have no doubt of the correctness of our conclusion in the foregoing cases, and which exactly accords with the law as declared in People v. Sands, 1 Johns. 78; 3 Am. Dec. 296. Steam power, gas, electricity, dynamite, gunpowder are in daily use, and have become indispensable to the con-

venience of the public, and for the public defense. Invention of man and advancement in science has enabled the manufacturer of, or dealer in, these articles to provide the public or the individual with almost, if not altogether, absolute protection against danger or hurt from explosion. And even had the manufacturing and storage of gunpowder, in its early history, been a nuisance at common law, the common-law definition of a nuisance would not include gunpowder at this day.

332 There is another aspect in which the record presents the plaintiffs' cause of action. Section 4093 of the Criminal Code of 1886, quoted supra, makes the keeping of more than fifty pounds of gunpowder for sale or for use within the corporate limits of a town or city a misdemeanor. We are of opinion that if the defendant kept gunpowder in violation of this statute, and the plaintiff, being a person intended to be protected by the statute, was damaged in consequence of such violation, the defendant would be liable to him. This is the rule declared in Laflin Powder Co. v. Tearney, 131 Ill. 322, 19 Am. St. Rep. 34, and in the case of Ferguson v. Gies, 82 Mich. 358, 21 Am. St. Rep. 576. The same rule was declared in this state in the case of Grey v. Mobile Trade Co., 55 Ala. 387, 407; 28 Am. Rep. 729. Of course, if the jury should find, as some of the evidence tends to show, that plaintiffs' building caught on fire from other causes and would have been destroyed independent of the explosion, it could not be said the explosion of the gunpowder was the proximate cause of the damage.

We are of opinion that a count prima facie sufficiently shows a want of due care, which charges the storing of large quantities of gunpowder in a wooden building in a populous place in the city of Cullman. The demurrer was properly sustained to the count which merely charged the storing of gunpowder and its explosion without further averment showing that on account of location, quantity, and surrounding circumstances it was dangerous. Some of the instructions of the court were not in accordance with correct legal principles as applied to the evidence.

Reversed and remanded.

THE CASE of Rudder v. Koopman, 116 Ala. 332, involved the same facts as the principal case, and was decided after a consideration of the same authorities as those reviewed in that case. In the former case, it was held that the keeping of large quantities of dynamite and gunpowder in a wooden building in a thickly settled part of a city where there were many buildings and persons is a nuisance, and creates a liability for the burning of a building ignited by firebrands cast upon it by an explosion of such gunpowder and dynamite caused by a fire originating on the premises of a

third person and without any fault of the owner of the explosives. Upon proof of the foregoing facts, the person thus injured may recover without allegation or proof of negligence on the part of the owner of the explosives, as to his manner or mode of keeping and storing them,

NUISANCE—PUBLIC AND PRIVATE DISTINGUISHED.—Inconvenience or injury resulting in common to all citizens from the same source of complaint is a common or public nuisance, and the remedy therefor must be by indictment: Mayer v. Marriott, 9 Md. 160; 66 Am. Dec. 326; Rung v. Shonberger, 2 Watts, 23; 26 Am. Dec. 95. A private nuisance is anything which does hurt or annoyance to the lands, tenements or hereditaments of another: Burditt v. Swenson, 17 Tex. 489; 67 Am. Dec. 665, and note.

Explosives—Liability for Keeping.

A number of the cases maintain that the true and only ground of liability for damage arising from keeping explosives and caused by an explosion happening while the party sought to be charged is in the lawful possession or use of the thing exploding, is the want of ordinary care or skill in its management, or in the manner in which it is kept. The true rule, however, we think is, that if the manufacture or storage of explosives is such as to amount to a nuisance, either public or private, the party so manufacturing or storing the articles in question is liable for all damages occasioned thereby or through an explosion thereof, even though he may not have been guilty of negligence and regardless of the care exercised in storing the explosives, or in choosing the place in which they are kept. Thus, in McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508-510, the court said that "the keeping of gunpowder, nitro-glycerine, or other explosive substances, in large quantities, in the vicinity of a dwelling-house or place of business, is a nuisance per se, and may be abated as such by an action at law or injunction in equity, and, if actual injury results therefrom, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." Again, in Laflin etc. Powder Co. v. Tearney, 131 Ill. 322, 19 Am. St. Rep. 34-36, Mr. Justice Magruder, in delivering the opinion of the court, said: "The powder magazine kept by the defendant upon its premises was so situated with reference to the dwelling-house of the plaintiff that it was liable to inflict serious injury upon her person or her property in case of an explosion. It was a private nuisance, and therefore the defendant was liable, whether the powder was carefully kept or not. As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury results from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence."

In this case of Laflin etc. Powder Co. v. Tearney, 131 Ill. 322, 19 Am. St. Rep. 34, it was further held that an allegation in a complaint that a powder magazine exploded shows that it was dangerous, and an allegation that the explosion destroyed plaintiff's

buildings shows that the keeping of gunpowder in the magazines, considered with reference to the locality, the quantity, and the surrounding circumstances, constitutes a nuisance per se. Hence, a complaint containing these averments is sufficient. This ruling is in accord with that in Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146, that an explosion in a dynamite factory raises a presumption of negligence, and, unexplained, makes a prima facie case for recovery for injury to person or property.

The erection of a powder magazine in a populous part of a city, and keeping stored therein large quantities of gunpowder, is a nuisance per se which renders the owner thereof liable for all damages arising therefrom: Cheatam v. Shearon, 1 Swan, 213; 55 Am. Dec. 734.

In Wilson v. Phoenix Powder Co., 40 W. Va. 413, 52 Am. St. Rep. 890, it was held that the owner of powder works is answerable for all damages done to the person or property by their explosion, whether he is negligent or not, if they are so situate that such explosion would probably involve injury to the person or property of third persons.

The manufacture and keeping of quantities of gunpowder, nitroglycerine, and other explosives in or dangerously near to public places, such as towns or highways, is a public nuisance and indictable as such. It makes no difference whether carefully or negligently conducted or managed. Negligence is here no material element. If damage is inflicted on a person by an explosion, he is entitled to compensation without proving negligence on the part of the defendant. He is injured by that which breaks the law—the law against public nuisance. He is in no fault, while the other man is, and he has received damage from that other man's wrongful act. He has a right to immunity from this injury, and the other man owed him the duty of securing him immunity. The state is wronged by the maintenance of a nuisance which may at any moment take the lives and destroy the property of its people passing and repassing over its highways, and reposing and working in their accustomed places, and the particular person hurt has special cause of complaint because he is specially injured": Wilson v. Phoenix Powder Co., 40 W. Va. 413; 52 Am. St. Rep. 892. To the same effect is Huntington etc. Land Development Co. v. Phoenix Powder Co., 40 W. Va. 711.

Gunpowder may be a nuisance although it affects only the plaintiff, and though no explosion has occurred, and in an action for damages suffered from such nuisance, he may join a demand for an injunction against it: Emory v. Hazard Powder Co., 22 S. C. 476; 53 Am. Rep. 730. The keeping of gunpowder or other explosive upon private premises may be a nuisance, when in case of explosion it would be liable to injure the persons or property of those residing in the neighborhood, although it should be carefully stored or kept. Negligence alone in the keeping of the gunpowder is not controlling, and the danger arising from the locality where such powder or other explosive is kept is to be taken into consideration in maintaining an action to recover for an injury from an explosion: Heeg v.

Licht, 80 N. Y. 579; 36 Am. Rep. 654. A person who places a powder magazine in dangerous proximity to another's dwelling is liable for the damages resulting from its explosion without his direct negligence, which need not be shown, nor is it necessary that such nuisance should have been prohibited by law: Chicago etc. Coal Co. v. Glass, 34 Ill. App. 364.

In Comminge v. Stevenson, 76 Tex. 642, it was held that a powder magazine situated some three or four hundred feet from plaintiff's residence, and which depreciated the value of his property, was a nuisance, for the maintenance of which he could recover compensatory damages.

Lounsbury v. Foss, 80 Hun, 296, was an action brought for the recovery of damages resulting from the death of plaintiff's intestate, caused by the explosion of the dynamite works of the defendant, and the court held that the keeping of explosive materials does not necessarily constitute a nuisance per se, that depends upon the locality, the quantity and the surrounding circumstances, but "the keeping of gunpowder or other explosive materials in a place or under circumstances where it will be liable, in case of an explosion, to injure the dwelling-houses or the persons of those residing in close proximity, constitutes a private nuisance, for which the person so keeping them is liable to respond in damages in case of injury resulting therefrom, and that without regard entirely to the question whether he was chargeable with carelessness or negligence." The erection of a powder-house for storing large quantities of gunpowder may be restrained by injunction to prevent irreparable injury, although the neighborhood in which it is sought to erect such magazine is sparsely inhabited, if in fact such neighborhood is fast filling up, and the magazine would be a constant menace to those already living there, and would depreciate the value of their property: Wier's Appeal, 74 Pa. St. 230. The keeping of explosives in such quantities as to be dangerous to persons and property, in such place and under such circumstances as to threaten injury to the persons and property of others, the consequence being an explosion which causes damage to such persons and property, gives a right of action for any damages that would not have been incurred in the absence of such explosives: Wright v. Chicago etc. Ry. Co., 27 Ill. App. 200.

In McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508, it appeared that a railroad company having legislative authority to construct a tunnel, contracted with McAndrews to do the work. He collected a magazine of explosives with which to do the necessary blasting, and these explosives, while thus stored, exploded, thereby causing a great amount of damage to the plaintiff, Collerd's, property, and it was held that he could recover of McAndrews without proof of negligence in the care of such explosives. Municipal ordinances prohibiting the storage within the limits of the city, or the transportation along its streets, of dynamite, nitro-glycerine, gunpowder, or other high explosive, in large quantities, are constitutional and valid: Hays v. St. Marys, 55 Ohio St. 197. The maintenance of a magazine containing a large quantity of gunpowder

within a city in violation of a municipal ordinance is a nuisance which renders the owner liable for any injury sustained by third persons or strangers from an explosion of such magazine from whatever cause resulting: Hazard Powder Co. v. Volger, 58 Fed. Rep. 152, 158; Wright v. Chicago etc. Ry. Co., 27 Ill. App. 200; Laflin etc. Powder Co. v. Tearney, 131 Ill. 322; 19 Am. St. Rep. 34. In such case, a person is not guilty of contributory negligence in living in his home or doing business near such magazine, with knowledge of the danger to be apprehended therefrom: Hazard Powder Co. v. Volger, 58 Fed. Rep. 152; nor does he assume the risks of explosions arising from negligent acts, although he has conveyed to the manufacturer the property upon which the explosive is manufactured and stored: Judson v. Grant Powder Co., 107 Cal. 549; 48 Am. St. Rep. 146. Nor is it any defense that there were other powder magazines in the same neighborhood at the time, that they were there when the land was bought and the injured buildings erected, that plaintiff's husband had been employed in the powder business, that the property was bought and such buildings erected after the erection of the defendant's magazine in order that plaintiff's husband might be near such magazine, that he had been a stockholder in a powder company, and that the plaintiff had leased her land to powder companies for the purpose of storing powder thereon: Laflin etc. Powder Co. v. Tearney, 131 Ill. 322; 19 Am. St. Rep. 34.

A municipal ordinance making it unlawful to store or keep for sale within the city limits any crude petroleum, or refined carbon oil, exceeding one barrel, in any part of a building except the cellar, is violated by a railroad company in keeping in its warehouse such articles for a reasonable time for the purpose of transportation. In such case, the railway company is liable for the damage to persons or property caused by the explosion of such materials regardless of the care exercised in storing them: Wright v. Chicago etc. Ry. Co., 27 Ill. App. 200. In Fillo v. Jones, 2 Abb. App. Dec. 121, it was held that the mere fact of keeping explosives, such as fireworks, within the city limits, in violation of a city ordinance, is not such a wrongful act as to render the keeper liable in damages, for a death caused by an explosion, but that negligence, or a common-law nuisance must be shown. This case, as we have shown, is opposed to the great weight of authority, and is in effect overruled by subsequent cases in the same state: Heeg v. Licht, 80 N. Y. 579; 36 Am. Rep. 654.

There is a line of cases which maintains that a magazine containing large quantities of gunpowder or other high explosive, and situated near to dwelling-houses and a public street, is not a nuisance per se, and that the owner thereof is not liable in case of an explosion and an injury to person or property, or both, unless he is in some way negligent in the manner in which the explosive is stored or kept. These authorities also insist that, as negligence is the gist of the offense or injury, it must be alleged and proved before a recovery can be had. The first case maintaining this doctrine is that of People v. Sands, 1 Johns. 78, 3 Am. Dec. 296, in effect overruled by Heeg v. Licht, 80 N. Y. 579; 36 Am. Rep. 654. In Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 746, it was held that the keeping of a

large quantity of gunpowder in a wooden building, near other buildings, amounts to a public nuisance, and renders the person so keeping it liable for damages resulting therefrom, although he may not have been guilty of negligence in causing the fire which caused the explosion and resulting damages. The decision in this case was placed upon the ground that the situation of the building containing the explosive rendered it a nuisance, and that keeping an explosive in a wooden and insecure building was negligence. And it was again held in Bradley v. People, 56 Barb. 72, that the careless or negligent keeping of gunpowder in large quantities, near dwelling-houses, or where the lives of persons are thereby endangered, is a nuisance per se. In this case, however, the careless and improper manner of building and continuing the powder-house and keeping the powder therein were fully charged. In Dumesnil v. Dupont, 18 B. Mon. 800, 68 Am. Dec. 750, the court held that the danger to residents in the vicinity of a powder magazine, properly constructed and managed, is not so impending or probable as to authorize a decree abating such magazine as a nuisance. The keeping of explosives does not necessarily constitute a nuisance per se, and whether it is or not depends upon the locality, the quantity, and the surrounding circumstances: Lounsbury v. Foss, 80 Hun, 296. Thus in Cook v. Anderson, 85 Ala. 105, it was held that while it might be said that the keeping of large quantities of explosive materials in a building in a populous town or city may be a nuisance, yet the fact whether it is or not must depend on the locality, quantity of the material stored, and the circumstances. Negligence in keeping it, or in the manner of its keeping, is requisite to impose a liability to answer in damages for injuries caused by an accidental explosion or fire, which is incumbent on the party affirming to prove, and in Collins v. Alabama etc. R. R. Co., 104 Ala. 390, the court decided that the fact that a railroad company stored a large quantity of gunpowder in its warehouse in a city is not, of itself, such act of negligence as entitles one whose goods are destroyed by an explosion of the powder to recover. Whether the storing of such a quantity of powder is a nuisance depends on the locality and peculiar circumstances of each particular case, and the burden of proving negligence in the storing of the explosive is on the person affirming it.

The fact that one erects a building in a populous neighborhood and stores therein large quantities of carbon oil and gasoline, does not constitute the storehouse a nuisance per se, but it may be shown that such building is a nuisance by evidence that the owner selfishly carries on a lawful business in a populous neighborhood in a negligent manner, greatly to plaintiff's injury: Gavigan v. Atlantic Refining Co., 186 Pa. St. 604.

A presumption of negligence does not arise from evidence showing that a tank of oil in the yard of the defendant's petroleum factory exploded, igniting other oil in such yard, thus causing the injury complained of. In such a case, negligence must be alleged and proved by a preponderance of the evidence: Cosulich v. Standard Oil Co., 122 N. Y. 118; 19 Am. St. Rep. 475. In Walker v. Chicago etc. Ry. Co., 71 Iowa, 658, plaintiff's property was injured by

the explosion of a carload of dynamite standing in defendant's railroad yard awaiting transportation; and it was held that the plaintiff could not recover without allegation and preponderance of evidence that the dynamite was not properly protected, or that it was stored in an improper place, or that the injury was otherwise caused through the negligence of the defendant.

If torpedoes necessary to the operation of a railroad are deposited and kept in the railroad company's untenanted sectionhouse, with its doors and windows securely fastened shut, and access to and removal of these explosives are effected by children by unfastening and opening one of such windows, the railroad company is not liable for a subsequent explosion of the torpedoes thus removed: Slayton v. Fremont etc. R. R. Co., 40 Neb. 840. If the contractors for a railroad company, engaged in building its railroad, with its consent, sublet the rock excavating to a third person, it being agreed that nitro-glycerine might be used in making the excavations and that such third person might erect a magazine on the company's land and store nitro-glycerine therein necessary to do the work, and such third person, subsequently, and without the consent of the company or the contractors, stores in such magazine a quantity of nitro-glycerine belonging to, and for the benefit of a third company, neither the company nor the contractors are liable for injury through an explosion of the last-named glycerine caused by the negligence of the subcontractor's servant while removing it from the magazine at the request of the owners: Cuff v. Newark etc. R. R. Co., 35 N. J. L. 17; 10 Am. Rep. 205; affirmed, 35 N. J. L. 574.

If negligence is shown on the part of the owner or keeper in the manner in which any high explosive is kept or stored, he is liable for all injuries resulting from an explosion thereof. Thus a railroad company, storing explosives in a depot building with a defective chimney flue, by reason whereof the building takes fire and there is an explosion injuring the plaintiff's neighboring property, is liable for such injury: Denver etc. R. R. Co. v. Conway, 8 Colo. 1; 54 Am. Rep. 537. A person in possession of real property as a bare licensee may recover the value of his personal property thereon destroyed by an explosion of dynamite stored a short distance away, if such explosion is caused by the want of ordinary care and skill of the owner of the dynamite in its management, although he is in lawful possession of the property and of the explosive at the time of the explosion: Clarkin v. Biwabik-Bessemer Co., 65 Minn. 483. If a railroad, hauling tank cars filled with petroleum, neglects to remove them for two hours after one of them has been set on fire by a collision, which neglect results in an explosion of one of the cars which might have been removed, the company is liable to one who is injured by such explosion: Henry v. Cleveland etc. R. R. Co., 67 Fed. Rep. 426. One who negligently keeps in his warehouse a large quantity of gasoline and kerosene in an unsafe condition is liable for the damages caused by an explosion thereof to an adjacent storehouse: Waters Pierce Oil Co. v. King, 6 Tex. Civ. App. 93. To put a number of slaves in a room to live, with an open keg of powder under their sleeping bunk, unknown to them, is negligence,

and subjects a negligent bailee to damages to the slaves for injuries arising from an explosion of the powder: Allison v. Western etc. R. R. Co., 64 N. C. 382. In Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, it appeared that a farm owner leased a small parcel of land in the middle of the farm to a laboring man, that a farm road approached the leased property, but did not reach it, that toward the leased land from the end of the road the landlord stored a box of dynamite, with cartridge exploders under a shed made against a stump, and only partially inclosed in a rough box, not always kept covered and never securely fastened. A child of the lessee, who had been at work in the field, went into such shed, took one of the cartridges from the box, and exploded it by striking it with a stone. Neither he nor his father knew what was kept stored in the shed, or of any danger there, or of any reason for keeping away from it, nor was there any warning on or about the shed, except the word "powder" written on the box, which neither of them seeing it could have read, and it was held that the landlord was negligent and liable in damages for the injury to the child caused by such explosion: Powers v. Harlow, 53 Mich. 507; 51 Am. Rep. 154.

UNION STAVE COMPANY *v.* SMITH.

[116 ALABAMA, 416.]

VENDOR AND PURCHASER—PURCHASE FROM EXECUTOR—ESTOPPEL.—A vendee in possession of the property of an estate of a deceased person acquired under purchase from an executor or administrator cannot retain such possession and defend, when sued for the purchase money, on the ground that the executor or administrator from whom he purchased and received possession had no authority to make the sale and could convey no title.

VENDOR AND PURCHASER—ESTOPPEL TO DENY AUTHORITY OF VENDOR TO CONVEY.—If a person in possession of land, not claiming it in his own right, sells it for a consideraton, and puts the vendee, who has knowledge of his vendor's title, in possession, such vendee cannot, without surrendering possession, defend against the recovery of the purchase price by his vendor, upon the ground that the latter had no authority to sell, and conveyed no title.

Action by B. B. Smith against the Union Stave Company to recover the amount alleged to be due for timber sold by the plaintiff. Charges 2 and 3, referred to in the opinion, were requests by the defendant for the court to instruct the jury to find in his favor if the evidence was believed by the jury or if such evidence left the matter in uncertainty or doubt. Judgment for plaintiff, and defendant appealed.

J. E. Brown, for the appellant.

Martin & Bouldin, for the appellee.

[419] COLEMAN, J. Barton B. Smith, the executor of the will of Henry F. Smith, without legal authority, sold to the defendant the timber growing upon certain lands of his testator. Under the contract, the defendant cut and converted a large quantity of timber, paid for the greater portion of it, and refused to pay for the balance. This suit was to recover that balance. Under the facts in the case, the court did not err in refusing charges No. 2 and 3 requested by the defendant. The essential facts upon which the plaintiff's right of action depends are not materially controverted.

The legal questions are, Can a vendee in possession of property of an estate, and who acquired possession of it under a purchase from an executor or administrator, retain that possession and defend, when sued for the purchase [420] money by his vendor, upon the ground that the vendor, administrator or executor, from whom he purchased and received possession, had no authority to make the sale, and could convey no title? The other question is, When a person in possession of land, not claiming it in his own right, sells the same for a consideration, and puts the vendee in possession, can the vendee defend against the recovery of the purchase price, without surrendering possession, upon the ground that his vendor had no authority to sell, and conveyed no title? At the time of the sale of the timber, the lands were vested in the children of the testator, one of whom and probably both had attained their majority, of full age, but the executor had not settled the administration of the estate. The decisions in this state are not consistent, at least upon the first proposition. In the case of Riddle v. Hill, 51 Ala. 224, the administratrix Hill sued upon a promissory note given for four mules sold by plaintiff as administratrix. The defense set up in the plea was, in effect, that the mules belonged to the estate of Charles W. Hill, and were sold by the plaintiff without authority, and that the sale was void. In the opinion the court declared, "as settled law, that a sale of personalty made by the administrator without an order of court, or under an order void on its face for want of jurisdiction passes no title to the purchaser." There is no conflict of authority that we know of under our statute as to this proposition. This was all the plea asserted. The court went further, however, and declared that "it was also settled that there can be no recovery on the purchaser's promise to pay the purchase money on such sale": Citing Beene v. Collenberger, 38 Ala. 647, and authorities there cited. In the case of Beene v. Collenberger, 38 Ala. 647, the facts showed

that Beene, as the administator of Ellen Chapman, without authority, sold two slaves to Collenberger and received the purchase money. Subsequently, the administrator de bonis non of Ellen Chapman recovered from Collenberger the slaves, the court holding that the sale by Beene was without authority and null and void. After the recovery of the slaves, Collenberger filed a claim for the purchase money against the estate of Beene, who had died. The question before the court was as to the allowance of the claim. There was really no question in the case [421] which called for an adjudication of the question under consideration in the present case. The court, however, did declare as a proposition arguendo that Beene could not have maintained an action on the contract of sale to Collenberger, the sale being contrary to law: Citing in support of the proposition Pettit v. Pettit, 32 Ala. 288, and Fambro v. Gantt, 12 Ala. 298. The only principle decided in the case of Pettit v. Pettit, 32 Ala. 288, bearing upon the question under consideration was, that the proceeds of a void sale of land sold by an administrator are not assets of the estate. This question was fully considered and reaffirmed in the case of Woods v. Legg, 91 Ala. 511, where a distinction was drawn as to the proceeds of an unauthorized sale of personal property by an administrator and a void sale of realty. In the case of Fambro v. Gantt, 12 Ala. 298, the decision of the case was rested fairly upon the proposition that an administrator could not coerce payment of the purchase money for an unauthorized sale of slaves made by him, that such a contract was unlawful and void in its inception, and that no right of action can arise from an unlawful act. This decision announces the proposition that though the sale was unlawful and void, the administrator could not recover back the property from the purchaser by an action in his own name, on the ground that he was estopped. The general rule is, that estoppels are mutual, and we do not well see why the doctrine of estoppel should apply to the administrator, and not apply to the purchaser, and not estop him from denying the right of his vendor to recover. In the case of Wilson v. Armstrong, 42 Ala. 168, 94 Am. Dec. 635, the question came fairly before the court, and it was held that "the order of sale was void, and the plaintiff [who was the vendor] cannot recover the purchase money." Says the court: "We regret such is the law, yet it has been long so settled in this state." It would seem from the foregoing examination of the decisions the question was fully settled in this state.

We propose next to examine some of the authorities which declare a different rule. In Hickson v. Lingold, 47 Ala. 449, the action was upon notes given for the purchase of lands sold by the executors. The defense was that the lands were sold without authority. The court held that the defense could not be made if the purchaser retained possession of the land. The invalidity [422] of the sale was no defense to the action. Many decisions are cited in support of the proposition, among them that of Harbin v. Levi, 6 Ala. 399, in which it was declared that when a purchase is made from an administrator, and the property delivered under the sale, the purchaser cannot defend upon the ground of an insufficient or defective title. It is said that "the general, if not the universal rule is, that one in this condition is estopped from denying his vendor's title." And in Ogburn v. Ogburn, 3 Port. 126, also cited, it was held that a vendee of a slave in possession could not retain the slave and defend on proof of want of title in the vendor. In this case the court declared that as a vendee could not recover back the purchase money and retain the property, he was equally estopped from denying the vendor's title, when sued for the purchase money. The decision in Hickson v. Lingold, 47 Ala. 449, has been cited with approval in many subsequent decisions of this court: Bland v. Bowie, 53 Ala. 152; Sivoly v. Scott, 56 Ala. 555; Meeks v. Garner, 93 Ala. 17. In Morris v. Morris, 58 Ala. 443, it is declared as a general proposition, in support of which many authorities are cited, that "the executor and purchaser from him cannot be heard to controvert the legality of their own sales and purchases, because each is estopped, so far as they are personally concerned." In the case of Martin v. Truss, 50 Ala. 95, the action was upon notes given for the purchase money of land sold by the plaintiff as executor, and the defendant had been let into possession. It was held that, retaining the land, he could not defend on the ground that the sale was irregular, erroneous or even void. Others might be cited, but enough has been to show that the decisions are at variance. The principle prevails almost universally that where there has been a sale and delivery of property, and payment of purchase money, to authorize either party to rescind the sale, and recover back that which he has parted with, he must restore that which he has received; and that a purchaser of property on a credit, retaining possession, cannot defend when sued for the purchase price, upon the ground of fraud, mistake, want of title in his vendor, or invalidity of the sale. Estoppels are mutual. If the purchaser

retains the property, he cannot set up the invalidity of the sale, by which he acquires the possession, [423] when sued for the price. Why should a different rule be applied to sales by executors and administrators? We can perceive no good reason for it. In the present case, there are other considerations also why the defendant should pay for the timber. The contract shows on its face that plaintiff sold the timber on the lands of the estate of Henry F. Smith. No doubt both parties supposed the executor had authority under the will; but whether this be true or not, the defendant was not deceived or imposed upon. It knew precisely what it was purchasing, and, as matter of law, knew whether the plaintiff had authority to make the sale. It cut and converted the timber under the purchase, retains the timber, and refuses to pay the purchase money. Again, it is in evidence that the children were informed of the sale, have accepted in part the purchase money paid under the contract to plaintiff, and have given no evidence of any intention to dissent from the sale. The general charge requested by the defendant (No. 1) was properly refused. There is no error in the record.

Rehearing granted, former judgment set aside, and the judgment of the trial court affirmed.

MR. CHIEF JUSTICE BRICKELL, dissenting, said: "A sale of growing timber, by which a present transfer of title is intended, is a sale of an interest in lands; if not in writing, it is offensive to the statute of frauds: Mitchell v. Billingsley, 17 Ala. 391; Heflin v. Bingham, 56 Ala. 566; 28 Am. Rep. 776; Riddle v. Brown, 20 Ala. 412; 56 Am. Dec. 202. In its primary aspect, the case presents directly the question whether a personal representative who has made a private sale of an interest in the lands of his testator or intestate, not having any other power than that which is derived from his office, may recover the purchase money; and that question, on authority and principle, must be answered negatively. As we have said, virtute officii, a personal representative succeeds to no estate or interest in the lands of the testator or intestate. Powers derived from and dependent on the statute he may exercise; but to those powers the statutes do not annex, and it is not essential to their due execution that an estate or interest in the lands should have been annexed. An order or decree of sale may be obtained from the court of probate, but, before granting it, the court must determine whether the necessity of sale the statutes prescribe exists; this determination is the function of the court, not of the personal representative; and a function not to be performed except upon evidence taken in the course of a judicial proceeding, to which the heirs or devisees are parties, having the opportunity to defend. The court must also determine at what place and upon what terms the lands are to be

sold, and in no event can it decree any other than a public sale, of which the statutory notice must be given. The sale must be reported to the court for confirmation; and after confirmation, before a decree of conveyance can be passed, there must be a report to the court of the payment of the purchase money. The sale is strictly and essentially judicial; the court is really the vendor, not the personal representative. The agency of the personal representative is that of a special officer or agent, designated by the law to perform special duties, and clothed with special trusts: Cruikshank v. Lattrell, 67 Ala. 318, and authorities cited.

"In its real significance and essence, the contract is an agreement for the commission of a deliberate trespass. If the lands had been in the possession of a tenant of a particular estate, and the estate of the devisee had been a reversion or a remainder, without being guilty of waste, the commission of which a court of equity would have enjoined, or for which compensation in damages would have been compelled, the tenant could not have severed and removed timber from the freehold, for the mere purpose of sale: Tiedeman on Real Property, sec. 74; Alexander v. Fisher, 7 Ala. 514. There was no particular estate, no rightful possession intervening—the immediate estate and possession resided in the devisees. The contract intends an invasion of the possession; the forcible severance and removal of things affixed to and forming part of the freehold, a deliberate trespass. All contracts for the unlawful invasion of property, or rights of property, are illegal, offensive to public policy and sound morality: Renfro v. Heard, 14 Ala. 23; 48 Am. Dec. 82; Moore v. Appleton, 26 Ala. 633. The law leaves all who share in the illegality where it finds them; it lends no aid to the enforcement of the contract while executory, nor after execution to its rescission, or to the restitution of whatever may have passed as its consideration: Clark v. Colbert, 67 Ala. 92; Williams v. Higgins, 69 Ala. 517.

"The court below, in my judgment, erred in refusing to instruct the jury, on the evidence, to find a verdict for the defendant."

VENDOR AND PURCHASER—REMEDIES FOR DEFECT IN TITLE.—A vendee cannot resist payment of purchase money on the ground of defect in title while he retains the warranty bond and continues in possession of the land: Lynch v. Baxter, 4 Tex. 431; 51 Am. Dec. 735. See Giles v. Williams, 3 Ala. 316; 37 Am. Dec. 692. He cannot, while declining to pay such price on account of the defect in the title, hold possession of the property until the title shall be perfected: Worley v. Nethecott, 91 Cal. 512; 25 Am. St. Rep. 209.

O'CONNOR *v.* BANK OF ATTALLA.

[116 ALABAMA, 585.]

EXECUTION SALES—LIABILITY OF PURCHASER TO REDEMPTIONER FOR WASTE.—A judgment creditor who redeems lands from a purchaser at an execution sale cannot recover damages for waste committed by such purchaser prior to redemption.

Denson, Burnett & Culli, for the appellant.

Dortch & Martin, for the appellee.

586 McCLELLAN, J. The only question presented by this record is, whether a judgment creditor who redeems lands from a purchaser at execution sale may recover damages for waste committed by such purchaser prior to redemption. The purchaser being the absolute owner of the land and all rights and interests in it, subject only to the right of repurchase outstanding in judgment creditors of the defendant in execution—among others—it would seem upon general principles that he is not liable to the redemptioner for waste; and so we understand it to have been substantially decided by this court: Morris v. Beebe, 54 Ala. 300, 307, 308; Otis v. McMillan, 70 Ala. 46, 61, 62, citing approvingly Kannon v. Pillow, 7 Humph. 292. The case of Dozier v. Mitchell, 65 Ala. 511, relied on for appellant, involved redemption from a mortgagee in possession before valid foreclosure and not 587 redemption from a purchaser at foreclosure sale; it was the assertion of the equity of redemption and not of the statutory right of redemption, and is, therefore, not authority in the case at bar.

Affirmed.

EXECUTION — REDEMPTION BY JUDGMENT CREDITOR. The right of redemption, being purely statutory, must be exercised in the manner prescribed by statute: Oldfield v. Eulert, 148 Ill. 614; 39 Am. St. Rep. 231, and note. A judgment creditor is not entitled, under the statute, to redeem from a sale made to satisfy a judgment entered in his own favor as well as in favor of other lienholders: Horn v. Indianapolis Nat. Bank, 125 Ind. 381; 21 Am. St. Rep. 231. The statutes of the different states which provide as to who may redeem property sold under execution differ more or less from one another, but they generally confer the right to redeem upon three classes of persons—the defendant in execution and his successors in interest, creditors having liens by judgment, and creditors having liens by mortgage: See monographic note to Horn v. Indianapolis Nat. Bank, 21 Am. St. Rep. 244.

Birmingham Building and Loan Association v. Boggs.

[116 Alabama, 587.]

MECHANICS' LIENS — MORTGAGE LIENS — SUPERIORITY.—A mortgage given by the vendee to secure the purchase money for land, or to secure the repayment of money procured to pay such purchase money, and executed at the time of the execution of a deed to the land to the vendee, and as part of the same transaction, creates a lien superior to that of a mechanic's lien for materials furnished to such vendee and used in the construction of a building on the land, both before and after the execution of the mortgage, where part of such materials were furnished and used before the execution of the deed, and while the vendee supposed he was the owner of the land, though in fact he had no title to, or interest therein at that time.

Symer & Symer, for the appellant.

J. H. Miller, for the appellee.

388 COLEMAN, J. The action is ejectment, and the appellee Boggs, who was plaintiff, relies upon a title derived from the enforcement of the mechanic's lien, and the appellant claims title through a mortgage foreclosure, and the question involves the priority of liens. The meritorious facts may be substantially stated as follows: One Garrison, the owner, entered into an agreement with one Westbrook to erect for him a dwelling upon lots numbered 6 and 7. In pursuance of the agreement Westbrook, who had contracted to furnish 589 the material, purchased from the Hawkins Lumber Company certain material and began the construction of the building. During the progress of the work, Garrison ascertained that he had mistaken the location of his lots 6 and 7, and that the improvements were being made upon lots 8 and 9, to which lots he had no title and in which he owned no interest. He was a mere trespasser upon these lots. He immediately suspended work, and it appears that Westbrook never afterward performed any other services, or procured any additional material. One Thweatt, a resident citizen of Talladega, a distant county, owned lots 8 and 9, and Garrison began arrangements for the purchase of these lots from the owner. Not having the money to pay for them, he applied to the Birmingham Building and Loan Association for a loan, which association agreed to advance him a sufficient amount. The agreement upon which the money was advanced or loaned seems to have been as follows: Thweatt executed a deed to Garrison which was not to be de-

livered until the purchase money was paid, and for this purpose the deed was sent by express to Birmingham. Garrison executed a mortgage upon the lots 8 and 9 to the building and loan association, and, upon the execution of the mortgage by Garrison, the loan company paid over the money to Thweatt and received the deed from the express company, and delivered it to Garrison. After completing the purchase of the lots 8 and 9 upon the terms stated, Garrison proceeded with the construction of the improvements, and for this purpose procured additional material from the Hawkins Lumber Company. The materials not having been paid for, the Hawkins Lumber Company instituted legal proceedings to enforce a materialman's lien, which resulted in a judgment and sale of the premises, at which sale Boggs, the appellee, became the purchaser. The building and loan association was not a party to the legal proceedings for the enforcement of the lien for materials, and, on the day of sale at which Boggs became purchaser, gave notice of its claim. The mortgage debt not being paid, it was foreclosed, and the appellant, by virtue of a power contained in the mortgage, purchased the property and entered into possession. Boggs instituted ejectment, and, under the instructions of the court, the jury returned a verdict for the plaintiff.

590 In considering the question, we regard the transaction between Garrison and Thweatt and the loan company for the purchase of lots 8 and 9 as contemporaneous and constituting but one transaction. Appellee insists that, under the rule declared in some of our decisions, the material lien attached as soon as the lumber was placed upon the lots. However correct a principle this may be when applied to the facts of the cases in which it was asserted, it was not intended to declare that the lien attached to lots not owned by the contracting party, and that a lien could be created by a mere trespass upon another's property. It is evident that at no time, in law, did Garrison own lots 8 and 9 before it was subject to the mortgage. Whatever rights Garrison may have acquired by the purchase related back in favor of the material lien, but no others, and, as we have seen, these rights were subject to appellant's mortgage. The court erred in assuming and declaring as matter of law, the material lien attached to lots 8 and 9 from the date the lumber was placed upon these lots.

Whether the appellee Boggs is entitled to any equitable relief under the rule declared in the case of Wimberly v. Mayberry,

94 Ala. 240, cannot be considered, as in the present action we can only deal with the legal title.

We are of opinion the decision of the question considered is sufficient to guide the trial court on the next hearing.

Reversed and remanded.

MECHANICS' LIENS—PRIORITY OVER MORTGAGES.—If mortgages are both executed and delivered, and the money which they are given to secure is advanced, before the commencement of the construction of a building on the mortgaged premises, liens for labor and materials used in the construction of such building are subject to the liens of the mortgages, though the latter are not recorded: Mathwig v. Mann, 96 Wis. 213; 65 Am. St. Rep. 47. A lien or mortgage existing at the inception of a mechanic's lien is protected: Oriental Hotel Co. v. Griffiths, 88 Tex. 574; 53 Am. St. Rep. 790. See Jarvis v. State Bank, 22 Colo. 309; 55 Am. St. Rep. 129, and note. The lien of a mortgage for the purchase price of land cannot be displaced or postponed by a mechanic's lien for materials furnished for a building thereon which attaches simultaneously with the acquisition of title by the mortgagor and the execution of the mortgage: Russell v. Grant, 122 Mo. 161; 43 Am. St. Rep. 563, and note. See Chapman v. Brewer, 43 Neb. 890; 47 Am. St. Rep. 779, and note.

TAYLOR *v.* FOMBY.

[116 ALABAMA, 621.]

BOUNDARIES—HEARSAY EVIDENCE TO ESTABLISH.—Hearsay evidence, if material, is admissible to establish ancient boundaries.

BOUNDARIES—ADVERSE POSSESSION.—If one of two adjacent landowners extends his fence so as to include within his inclosure lands belonging to his neighbor, in ignorance of the true boundary line between them and without intention of claiming such extended area, but intending to claim adversely only to the true boundary line, such possession is not adverse, but if the fence, so extended, is believed to be the true line, and the claim of ownership is to the fence, such possession is adverse, although the established boundary is erroneous.

BOUNDARIES—QUESTION FOR JURY.—If, in a contest concerning the true boundary line between adjacent owners, the evidence, as well as two surveys thereof, is in conflict, the question should be submitted to the jury.

BOUNDARIES—WHAT GOVERNS.—If different parts of the description of boundaries in a deed or patent conflict, those particulars which are most stable and certain, and least liable to be mistaken, are to prevail and a description of boundaries by known and visible natural and artificial monuments or landmarks is preferred to a description by courses and distances and other measurements.

BOUNDARIES—HOW ASCERTAINED.—In determining boundaries, courses and distances are the next most certain items of description, after calls for monuments, natural or artificial, to which alone they yield, and in the absence of calls for monuments, or if those called for cannot be found, the courses and distances control quantity, and other less definite terms of description.

BOUNDARIES—WHAT CONTROLS.—In establishing an original line of survey according to the field notes used therein, attention is given, first to calls for natural or artificial monuments, and, if these are not to be found, to courses and distances, with the variation of the needle from the true meridian, as indicated for the original survey on the field notes.

BOUNDARIES—BY WHAT GOVERNED.—All disputes as to the boundary of land are governed by the United States survey, in the absence of statute to the contrary. The field notes and plats of the original surveyor are the primary and controlling evidence of boundary. The lines of sections and subdivisions thereof must be located by the original survey.

BOUNDARIES—HOW ESTABLISHED.—If, in fixing the boundary of land, the lines established by the original government survey are obvious, they must be followed though made on an assumed or wrong magnetic variation. It is only when lost lines and corners are to be renewed that due allowance must be made for the variation of the magnetic needle from the true meridian.

BOUNDARIES—BY WHAT CONTROLLED.—If, in establishing a disputed boundary, the line is to be run by certified copies of the field notes of the original government survey and by the calls for natural monuments indicated thereon, the magnetic variations of the needle from the true meridian have no bearing or influence on the question.

Ejectment. The parties to the suit admitted "that the only question of difference and dispute between the parties was as to the true location, as run and established by the surveyors who made the original United States government surveys, of the section line, running from the southwest corner of section 10, township 20, range 10, in Randolph county, north to the Tallapoosa river." Judgment for plaintiff, and defendant appealed.

S. Blake, for the appellant.

J. W. Oliver, for the appellee.

626 HARALSON, J. The first, second, third, and fourth assignments of error are without merit. That boundaries may be proved by hearsay, and by the long acquiescence of parties in a designated boundary as being the true one, is not to be questioned. Landmarks very frequently are of perishable materials, which soon decay or are destroyed. It is important, therefore, that hearsay, if pertinent and material to the issues between the parties, should be received to establish ancient boundaries: Boardman v. Reed, 6 Pet. 341. It is also well settled that if one of two adjacent landowners extend his fence so as to embrace within his inclosure lands belonging to his neighbor, in ignorance of the true boundary line between them, and with no intention of claiming such extended area, but intending

to claim adversely only to the real and true boundary line, wherever it may be, such possession will not be adverse or hostile to the true owner. But if the fence is believed to be the true line, and the claim of ownership is to the fence, even though the established division is erroneous, a different rule will apply, as has been held; for in such case there is a clear intention to claim to the fence as the true line, and the possession does not originate in an admitted possibility of a mistake: Alexander v. Wheeler, 69 Ala. 340; Bernstein v. Humes, 75 Ala. 244; Humes v. Bernstein, 72 Ala. 556.

627 The evidence admitted tended to show, without dispute, that the plaintiff had been in possession of the disputed premises for about thirty years; that a fence had been built for a part of the way, upon a line established by a survey made by Joseph Curry, a county surveyor, in 1856; that the owners of the land in section 9 had recognized the Curry line as the true line; that said line had been recognized by the owners on each side of the line as the dividing line between each section, up to the time of the Jones survey in March, 1896, a period of about forty years. After a witness had so testified, the court explained to the jury that they could only look to this testimony, if true, as a circumstance to be considered by them, together with all the other evidence in the cause, as determining where the true line had been run by the United States surveyors. This explanation placed the evidence admitted, certainly, on unassailable grounds.

2. The first charge requested by defendant was properly refused. The two surveys by Jones and Perryman both introduced in evidence to show where the line surveyed by the United States government ran, were in conflict, and the evidence in the cause was altogether such as ought to have been submitted to the jury, as was done.

3. As to the second charge, we may appropriately repeat what has been so well said by Mr. Freeman, in his notes to the case of Heaton v. Hodges, 14 Me. 66, 30 Am. Dec. 731: "As a result of the general rule already referred to, that where different parts of the description in a deed or patent conflict, those particulars which are most stable and certain, and least liable to be mistaken, are to prevail, it has been the established rule of construction that a description of boundaries by known and visible natural and artificial monuments or landmarks is generally to be preferred to a description by courses and distances and other measurements. A principle of law, so well and so

long settled, does not require the citation of authorities to support it." As illustrative of the various applications of this rule, numerous authorities are appended.

The learned annotator makes the further statement of the rule that "courses and distances are the next most certain items of description, after calls for monuments, natural or artificial, to which alone they yield: Chadburne [628] v. Mason, 48 Me. 389. In the absence of calls for monuments, therefore, or if the monuments called for cannot be found, the courses and distances control quantity, and all other less definite terms of description."

In establishing an original line of survey, according to the field notes used in such survey, attention is given, therefore, first to calls for natural or artificial monuments, and if these are not to be found, to courses and distances, with the variation of the needle from the true meridian as indicated for the original survey on the field notes. Perryman ran his line by the natural monuments indicated, and by coincident courses and distances indicated, and established it by the monuments. Curry ran his line without field notes, by setting "the compass [as is stated] so as to make the line run to meet the line exactly opposite the same section line at the north bank of the Tallapoosa river," and his line coincided with Perryman's. Jones professed to run his line by calls on field notes, the same as used by Perryman. The general rule is, that all disputes as to the boundaries of land are governed by the United States surveys, unless there is some statute of the state to the contrary; and the United States statutes make the field notes and plats of the original surveyor the primary and controlling evidence of boundary: Tiedeman on Real Property, sec. 832; 24 Am. & Eng. Ency. of Law, 1002. In this state, the lines of sections and subdivisions thereof are to be located by the original government survey: Code 1886, sec. 84, subds. 13-15, sec. 832. In these surveys, north and south lines are to be run, according to the true meridian: U. S. Stats., sec. 2395; and it has been held that where the lines are obvious, they must be followed, though made on an assumed or wrong magnetic variation: Bonney v. McLeod, 38 Miss. 393. And, it is only when lost lines and corners are to be renewed, due allowance must be made for the variation of the magnetic needle from the true meridian: Bryan v. Beckley, 12 Am. Dec. 276; Budd v. Brooke, 3 Gill, 198; 43 Am. Dec. 321. In the latter case it is said: "In changing the course to gratify a call, the

line is run accordingly, either to east or to the west, without regard to the fact whether from the date of the original survey to the time of the location of the line, the variation of the needle has been to the east or to the west."

629 The line in this case was run, as the evidence tends to show, by certified copies of the original field notes, and by the calls for natural monuments indicated thereon. Where that line was, was a fact to be determined by the jury from all the evidence in the case. There was no error, therefore, in the charge by the court that the magnetic variations of the needle from the true meridian had no bearing or influence on the case. Nor was there any error in refusing charge No. 2, on the same subject, requested by the defendant.

There is no error in the record, and the judgment below is affirmed.

EVIDENCE — HEARSAY — ADMISSIBILITY TO PROVE BOUNDARY.—Hearsay evidence, in the absence of higher evidence of the identity of land, is admissible to prove ancient boundaries: Martin v. Atkinson, 7 Ga. 228; 50 Am. Dec. 403; George v. Thomas, 16 Tex. 74; 67 Am. Dec. 612, and note; extended note to Coate v. Speer, 15 Am. Dec. 628-631.

ADVERSE POSSESSION BY MISTAKE AS TO BOUNDARIES. In cases of mistake as to the true boundary line between adjoining lands, the real test as to whether or not a title is acquired by a holding for the period of the statute of limitations is the intention of the party holding beyond the true line. If such occupation is by mere mistake, with no intention on the part of the occupant to claim as his own, land which does not belong to him, but he intends to hold only to the true line, wherever it may be, the holding is not adverse. If, however, the occupant takes possession, believing the land to be his up to the mistaken line, and, claiming title to it, so holds, the holding is adverse. The intent to claim up to the line is an indispensable element of adverse holding; the claim of right must be as broad as the possession: Watrous v. Morrison, 33 Fla. 261; 39 Am. St. Rep. 139 and note; Wilson v. Hunter, 50 Ala. 626; 43 Am. St. Rep. 63; Preble v. Maine etc. R. R. Co., 85 Me. 260; 35 Am. St. Rep. 366, and note.

BOUNDARIES—DISPUTED—QUESTIONS FOR JURY.—Questions of disputed boundaries, where doubts exist as to monuments, corners, or lines, are issues of fact for the jury: Extended note to Johnson v. Archibald, 22 Am. St. Rep. 36.

BOUNDARIES—WHAT GOVERNS—HOW ASCERTAINED.—The settled rule in descriptions of boundaries of land is that monuments, whether natural objects or artificial marks, are allowed to dominate courses and distances given in deeds: Crampton v. Prince, 83 Ala. 246; 3 Am. St. Rep. 718; because they are more endurable and less likely to change: Extended note to Johnson v. Archibald, 22 Am. St. Rep. 34. In the sale of land in sections or subdivisions thereof, including lots, according to the government survey, the survey as actually made controls, if the monuments, corners, or lines actually established can be located or proved: Watrous v. Morrison, 33 Fla. 261; 39 Am. St. Rep. 139, and note. Where there was nothing in the deed or patent to control the call for course

and distance, the land, according to the practice in the older states, was to be taken as bounded by the courses and distances of the deed or patent according to the magnetic meridian: Note to Wells v. Jackson Iron Mfg. Co., 90 Am. Dec. 592.

PHŒNIX ASSURANCE COMPANY *v.* MCAUTHOR.

[116 ALABAMA, 659.]

EVIDENCE—AGENCY.—Error in admitting evidence in relation to an agency before such agency is shown to have existed is cured by subsequent evidence establishing such agency.

EVIDENCE.—SECONDARY EVIDENCE of the contents of a written private contract is not admissible until a sufficient excuse is shown for a failure to produce the contract itself.

EVIDENCE—SECONDARY.—If an insurance policy or written contract is shown to be in the possession of the person who wrote it, but no notice is served upon him to produce it, his evidence that he does not know where such writing is, and that he cannot find it, is not sufficient to admit secondary evidence of its contents.

EVIDENCE—SECONDARY—CONTENTS OF WRITING.—If a person is shown to have had the possession of a written contract, secondary evidence of its contents is admissible only after it is shown that he has made a bona fide and diligent, but unsuccessful, search for it in the place where it was most likely to be found.

INSURANCE—DELIVERY OF POLICY—Whether or not an insurance policy has been delivered after its issuance does not depend upon its manual possession by the assured, but upon the intention of the parties as manifested by their acts or agreement, and where the contract of insurance is completed and put in writing, and the insured is notified by the insurance agent that this has been done, and that the policy is in his possession for the insured, this must be deemed a sufficient delivery of the policy to render it valid and binding.

INSURANCE — CANCELLATION — BURDEN OF PROOF. If, in an action to recover insurance, the defense is set up that there was a cancellation of the policy before the loss by reason of a failure to pay the premium within five days after notice, as required by the policy, and the evidence shows a completed contract by the issuance and delivery of the policy, the burden of showing such cancellation is upon the defendant, and if there is a conflict of evidence the question must be determined by the jury.

WITNESSES.—ONE WHO INTRODUCES a witness who testifies in his behalf is not bound by such testimony as being that of a credible witness worthy of belief.

Action upon a policy of fire insurance. The defendant requested that the following instructions be given to the jury, and the court refused the request: 1. "If the jury believe the evidence, they must find for the defendant." 2. "The court charges the jury that Frank Murphree was introduced by the plaintiff as his witness, and the plaintiff is bound by Frank Murphree's testimony as that of a credible witness worthy of belief." Judgment for plaintiff, and the defendant appealed.

W. L. Parks, for the appellant.

Espy & Fanner, for the appellee.

663 HARALSON, J. 1. Suit upon a fire insurance policy; complaint in code form. The second and third assignments of error—the first assignment not being insisted on—may be considered together as raising substantially the same objections to the introduction of evidence, viz.: 1. That the evidence offered of the contents of the policy was secondary; 2. That only a part of the contract of insurance was offered; and 3. That Murphree, who issued the policy, had not been shown to be the agent of the company. As to the last objection, it is sufficient to say that, if there was error in the ruling of the court as to Murphree's agency, it was cured, in that it was afterward shown that he was a member of the firm of Glenn & Murphree, and that they were agents of the defendant company at the time of the issuance of the policy.

If the first objection was good, it included the second. It is a familiar rule that secondary evidence of the contents of a written private contract is not admissible until a sufficient excuse is shown for a failure to produce the contract itself: Home Protection etc. v. Whidden, 103 Ala. 203; Lewis v. Hudmon, 56 Ala. 186. The proof showed that the policy was in the possession of Murphree, and though issued, it had not been delivered to plaintiff. There had been no notice to Murphree to produce the policy. He did testify that he did not know where the policy was, and that he could not find it. This was not a sufficient showing for the introduction of secondary evidence of the contents of the paper. The witness did not show where he looked for the policy, nor what the character of the search he made was—whether 664 diligent or otherwise. He ought to have shown that he made a bona fide and diligent, but unsuccessful search for it in the place where it was most likely to be found. The court erred in admitting and not excluding the evidence: Bogan v. McCutchen, 48 Ala. 493; Tanner v. Hall, 89 Ala. 628; 1 Greenleaf on Evidence, 558.

2. Whether or not the policy was delivered after its issuance depended not upon its manual possession by the assured, after its issuance, but rather upon the intention of the parties as manifested by their acts or agreements: for, as has been well said, "whatever the parties have agreed to as a delivery, or whatever their conduct shows to have been considered as a delivery by them, controls": 11 Am. & Eng. Ency. of Law, 285, and au-

thorities there cited; Home Ins. Co. v. Adler, 71 Ala. 516, 526. The evidence tended, without conflict, to show that the contract of insurance was completed and put in writing, and the assured was notified by the agent that this had been done, and that the policy was in his possession for the plaintiff.

3. The defendant claimed that the policy had been canceled under and according to a provision contained in it for the purpose, before the fire occurred. There was a plea setting up a cancellation as a defense, and the proof elicited by defendant from plaintiff's witness showed a condition in the policy which gave the company the right to cancel it, unless the premium was paid within five days after notice. The evidence was in conflict as to whether the premium was paid, and as to whether there was any notice for cancellation. The burden of showing the cancellation, when the undisputed evidence showed there was a completed contract, was on the defendant, and the evidence being in dispute, the question was properly submitted to the jury. The general charge for defendant was rightly refused.

Charge 2 requested by defendant was properly refused: Jones v. State, 115 Ala. 67; 3 Brickell's Digest, secs. 98-100, p. 828; 29 Am. & Eng. Ency of Law, 812.

Reversed and remanded.

EVIDENCE—SECONDARY—RULE AS TO ADMISSIBILITY.—Secondary evidence of the contents of a letter or paper is not admissible where the letter or paper is not produced, and its nonproduction is not accounted for: State v. Reed, 53 Kan. 767; 42 Am. St. Rep. 322. If a writing is shown to be lost, secondary evidence of its contents may be received: Spears v. Lawrence, 10 Wash. 368; 45 Am. St. Rep. 789, and note.

INSURANCE—DELIVERY OF POLICY — WHAT CONSTITUTES.—The contract of insurance is complete without delivery of the policy, where an application has been made which has been approved and accepted by the company or its proper agents for that purpose, and a policy has thereupon been made and executed, and notice of such execution given to the applicant: Sheldon v. Connecticut Life Ins. Co., 25 Conn. 207; 65 Am. Dec. 565. See Dibble v. Northern Assur. Co., 70 Mich. 1; 14 Am. St. Rep. 470.

INSURANCE — CANCELLATION OR FORFEITURE OF POLICY—BURDEN OF PROOF.—The burden of proof is upon the company to prove nonpayment of a premium note in order to avoid a policy made and accepted on condition that it should cease and determine upon the failure of the insured to pay when due a premium note given by him to the insurers: Hodsdon v. Guardian Life Ins. Co., 97 Mass. 144; 93 Am. Dec. 73.

WITNESSES—IMPEACHING ONE'S OWN.—The party calling a witness is not precluded from showing the truth of any particular fact by any other competent testimony: Omaha etc. Co. v. Tabor, 13 Colo. 41; 16 Am. St. Rep. 185. The rule as now laid down in both

the English and American cases, as appears from the examination of a long line of harmonious authorities, appears to be that a party who produces witnesses, and presents them to the court, will not be permitted afterward to impeach their general reputation for truth, or to impugn their credibility by general evidence showing them to be unworthy of belief. If, however, after a party has thus called a witness, he should state facts against him, or his evidence should take him by surprse, he may call other witnesses to disprove the facts as testified to by his first witness: Extended note to Burkhalter v. Edwards, 60 Am. Dec. 749; Olmstead v. Winsted Bank, 32 Conn. 278; 85 Am. Dec. 260.

CLARKE *v.* STATE.

[117 ALABAMA, 1.]

INDICTMENT FOR KILLING AN INFANT—SEX OF CHILD, WHETHER MUST BE DESCRIBED.—In an indictment for killing an unnamed infant by inflicting injury on its mother before its birth, it is not necessary to state the sex of the child.

WITNESSES.—A WIFE IS A COMPETENT WITNESS TO TESTIFY IN FAVOR OF HER HUSBAND on the trial of a charge against him of having beaten her while pregnant, thereby causing the death of her child after its birth, for in all cases where personal injuries are alleged to have been committed by a husband or wife against each other, the injured one is an admissible witness for or against the other.

WITNESSES.—IN ALL CASES IN WHICH A WIFE is admissible as a witness against her husband she is admissible for him.

THE MURDER OF AN INFANT MAY BE COMMITTED BY INFLICTING INJURY ON IT OR ON ITS MOTHER while it remains in her womb, if therefrom it dies after first being born. It is otherwise if it dies from such injury while still in her womb.

MURDER IN THE SECOND, AND NOT IN THE FIRST DEGREE, may be committed by the inflicting of injuries on a woman known to be quick with child, from which it dies after its birth, if there is no evidence of express malice or of an intent to take life, though such injury consisted of beating the mother unlawfully and in a manner dangerous to life. Malice in such a case is implied, and implied malice is the distinguishing characteristic of murder in the second degree.

MANSLAUGHTER.—IF THE KILLING OF A HUMAN BEING IS NOT COMMITTED NEGLIGENTLY, but by an act itself unlawful and dangerous to human life, from which malice is implied, it is proper to refuse to instruct the jury respecting manslaughter, for the offense is murder in the second degree.

Indictment against the defendant for murder. It was demurred to on the ground that it failed to state the name and sex of the child alleged to have been murdered, but the demurrer was overruled. The evidence tended to show that the defendant unlawfully beat his wife while she was quick with child, inflicting injuries from which it died after it was born. The defendant offered his wife as a witness for the purpose of proving by her that he did not beat her at the time stated by

the witnesses for the prosecution, nor at all. The prosecution objected to her testifying on the ground that, because of her being the wife of the accused, she was incompetent to testify for him. The objection was sustained. The court instructed the jury that the evidence did not tend to sustain a conviction of any crime unless it was murder in the second degree, that if a woman be quick with child and be beaten by one intentionally and knowing her to be so, and the child, after being born alive, die because of such beating, then the offense was murder in the second degree. The jury found the defendant guilty of murder in the second degree.

Sollie & Kirkland, for the appellant.

William C. Fitts, attorney general, for the state.

[4] BRICKELL, C. J. 1. The indictment contains three counts, not materially different, alleging that the defendant, with malice aforethought, killed an infant child by the unlawful beating of the mother while it was in the womb, causing its death after birth. The [5] child is not otherwise described than by reference to its maternity; and in the first and third counts it is alleged that it was unnamed, and in the second count it is alleged the name was to the grand jury unknown. In the English precedents of indictments for like offenses, in the cases referred to in Wharton on Homicide, section 305, and Wharton on Criminal Pleadings, section 112, the sex of the child is averred, but there was no discussion of the necessity of the averment. In Mr. Bishop's Directions and Forms, section 527, a form of indictment for this particular offense is found, containing a distinct averment of the sex of the child. We have seen no American case in which the necessity of the averment was the subject of consideration, except that of State v. Morrissey, 70 Me. 405, in which the court said: "We have seen no precedent of indictment that omits an allegation of the sex of the infant child, nor has any case come to our notice which decides that the allegation is necessary. Mr. Wharton, in his Criminal Precedents, remarks that the averment is necessary. But why necessary? The law requires a person to be described by his name. We take it that if an infant has a name, there would be no more occasion for averring the sex than in any other case. But it is laid down as a rule that, the name being unknown, it is sufficient to aver the name of the killed or injured person to be unknown. The law requires that an indict-

ment shall be so certain as to the party against whom the offense was committed as to enable the prisoner to understand who the party is, and upon what charge he is called upon to answer, so as to prevent the prisoner from being put in jeopardy a second time for the same offense, and as will authorize the court to give the appropriate judgment upon conviction. What would it practically add, in these respects, to the rights and safety of the accused in this case to have the sex alleged?" The tendency of all our legislation, and of our decisions for more than half a century, has been to divest indictments of mere formal allegations, while not lessening the degree of evidence by which the accusation they may import must be supported. The general statutory requirement is that "the indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are the words 'force and arms' or 'contrary to the form of the statute' necessary": Crim. Code 1886, sec. 4368; Crim. Code 1896, sec. 4896. If time be not a material ingredient of the offense, a general statement that it was committed before the finding of the indictment is sufficient: Crim. Code 1886, sec. 4373; Crim. Code 1896, sec. 4901. It is not necessary to allege the venue of the offense, but on the trial, it must be proved to have been committed in the county in which the indictment is preferred: Crim. Code 1886, sec. 4374; Crim. Code 1896, sec. 4902. When the name of the defendant is unknown to the grand jury, it may be so alleged without further identification of the defendant: Crim. Code 1886, sec. 4376; Crim. Code 1896, sec. 4904. When the means by which the offense was committed are unknown to the grand jury, and do not enter into the essence of the offense, the indictment may allege that they are unknown: Crim. Code 1886, sec. 4378; Crim. Code 1896, sec. 4906. When an intent to injure or defraud is necessary to constitute the offense, it is sufficient to allege an intent to injure or defraud generally, without naming the particular person, corporation, or government intended to be injured or defrauded: Crim. Code 1886, sec. 4380; Crim. Code 1896, sec. 4908. These statutes, though in some particulars merely affirmatory of the common law, taken in connection, are illustrative of the general legislative policy, to divest indictments of mere formal averments, while not narrowing the

scope of the evidence by which they may be supported. The sex of the child was not an ingredient of the offense; an allegation of it would have been descriptive, necessary to be proved as laid, and if not proved, involving a variance, the peril of which was properly avoided. Without contravening the general legislative policy deducible from the statutes to which we have referred, and other kindred statutes, and the course of judicial decision keeping pace with this policy, we cannot hold that an allegation of the sex of the child was necessary to the sufficiency of the indictment. The remaining causes of demurrer to the indictment, as will be apparent from the further consideration of the case, were not well taken.

[7] 2. The gravamen, an indispensable constituent of the offense charged in the indictment, is the unlawful beating of the mother while pregnant, causing the death of the child after birth. Though not alleged in the indictment, the fact was shown by the evidence that she was, at and prior to the beating, the wife of the defendant; and the next question for consideration is her competency as a witness for the defendant. In relation to the competency of husband and wife as witnesses for or against each other in criminal cases or proceedings, we have no statute which changes or modifies the common law. By the common law, in all cases of personal injuries committed by husband or wife against each other, the injured party is an admissible witness against the other: 1 Greenleaf on Evidence, sec. 343; 1 Bishop's New Criminal Procedure, secs. 1151-1155; Wharton's Criminal Evidence, sec. 393, et seq. This exception to the general rule excluding husband and wife as witnesses for or against each other, it may be, originally grew out of a supposed necessity of the protection of the wife against personal violence, threatened or actual, by the husband. Whatever may have been the origin of the exception, it is now recognized as extending to all cases in which the element of personal violence to the wife is a necessary constituent of the offense: State v. Dyer, 59 Me. 303. The case cited was an indictment against the husband and another for using an instrument with intent to procure the miscarriage of the wife while pregnant, and is not in reason or principle distinguishable from the present case. Wherever the element of personal violence is a necessary constituent of the offense, every reason exists, upon which the exception rested originally, and for the sake of public justice, the wife should be admitted as a witness. And in all cases in which she is admissible against, she is admissible for, the husband:

Wharton's Criminal Evidence, sec. 394 a; Commonwealth v. Murphy, 4 Allen, 491; State v. Neill, 6 Ala. 685; Tucker v. State, 71 Ala. 342. The court below erred in the exclusion of the wife as a witness.

3. Murder was defined or described by Lord Coke in these words: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, express or implied." The definition or description was adopted by Blackstone, and in commenting [8] upon the phrase "reasonable creature in being," it was said: "To kill a child in the mother's womb is now no murder, but a great misprision; but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them": 2 Cooley's Blackstone, 197. In 3 Russell on Crimes, sixth edition, 6, it is said: "An infant in its mother's womb, not being in rerum natura, is not considered as a person who can be killed within the description of murder; and, therefore, if a woman, being quick or great with child, take any potion to cause abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter." Further, it is said: "When a child, having been born alive, afterward died by reason of any potion or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them." The same doctrine is stated in 1 Wharton's American Criminal Law, 9th ed., sec. 445; Wharton on Homicide, sec. 303; 2 Bishop's Criminal Law, sec. 633. The offense is murder, not manslaughter, upon the settled principle of the common law, that where death ensues from an act done without lawful purpose, dangerous to life, malice, the essential ingredient of murder, is implied: Commonwealth v. Parker, 9 Met. 263-265; 43 Am. Dec. 396; State v. Moore, 25 Iowa, 134; 95 Am. Dec. 776; 1 Wharton's Criminal Law, 9th ed., sec. 316; 1 Bishop's Criminal Law, sec. 328, et seq.

4. The court below, very properly, limited the instructions to the jury to the determination of whether the offense was murder in the second degree. There was an absence of all evidence of express malice—of all evidence that the alleged beating of the wife was with an intent to take life, and, of consequence, an exclusion of the characteristics of murder in the first degree. If the beating was inflicted, it was unlawful, dangerous to the life of the mother, an act malum in se, from which,

as we have said, malice is implied; and implied malice is the distinguishing characteristic of murder in the second degree: 3 Brickell's Digest, sec. 495, p. 214. "Manslaughter is the unlawful and felonious killing of another, without any malice, either express or implied": Wharton on Homicide, sec. 4. The code divides manslaughter into degrees, and the first degree is described as the voluntary deprivation of [9] human life: Crim. Code 1896, sec. 4800. The statute is construed in connection with the common law, and it has not been supposed that it enlarged or diminished the elements of the offense as known to the common law: Harrington v. State, 83 Ala. 9; Williams v. State, 83 Ala. 16. The offense not having been committed negligently, if committed at all, perpetrated by an act in itself unlawful and dangerous to life, from which malice was implied, there was marked propriety in withholding all instructions touching manslaughter—such instructions would have been abstract. Tested by these principles, the instructions given by the court ex mero motu, to which exceptions were reserved, are free from error.

5. The several instructions requested by the defendant and refused, numbered from 3 to 7 inclusive, are in conflict with the view of the law we have expressed, and were properly refused; and the same is true of the tenth instruction. Of the ninth instruction it should be said there was not an absence of all evidence from which the jury could have inferred that the bruises on the person of the mother, to which the exception refers, were inflicted by the defendant; whether this was the just inference, it was their province to determine. The eight instruction is so obviously erroneous that it is unnecessary to discuss it; and the same must be said of the first, second, and third instructions.

For the errors we have pointed out, the judgment must be reversed and the cause remanded; the defendant will remain in custody until discharged by due course of law.

Reversed and remanded.

WITNESSES — HUSBAND AND WIFE — COMPETENCY.—A wife is competent to testify against her husband in a criminal action whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted: Note to Baxter v. State, 53 Am. St. Rep. 722. See extended note to State v. Boyd, 27 Am. Dec. 377-381.

HOMICIDE—MALICE—WHEN IMPLIED.—If the act which produced death be attended with such circumstances as indicate a wicked, depraved, and malignant spirit, the law will imply malice

without reference to what was passing in the prisoner's mind at the time: State v. Levelle, 34 S. C. 120; 27 Am. St. Rep. 799, and note.

HOMICIDE—MURDER IN SECOND DEGREE.—Homicide perpetrated through criminal carelessness, but not from willful design, is murder of the second degree: Whiteford v. Commonwealth, 6 Rand. 721; 18 Am. Dec. 771, and monographic note on the statutory division of murder into degrees.

HOMICIDE—INDICTMENT—NAME OF DECEASED.—The name of the person murdered must be stated in the indictment, and if it is not so stated the defect is fatal: Dias v. State, 7 Blackf. 20; 39 Am. Dec. 448. An indictment for the murder of one George Bopp need not aver that the deceased was a human being; the name imports a human being: Palmer v. People, 138 Ill. 356; 32 Am. St. Rep. 146.

BYNON *v.* STATE.

[117 ALABAMA, 80.]

MARRIAGE, EVEN ON A PROSECUTION FOR BIGAMY, MAY BE PROVED BY CIRCUMSTANCES, and the jury may properly infer marriage from evidence tending to prove that the accused and the woman alleged to have been his wife before the second marriage lived under the same roof and had born to them children, that she and the children were known by his name, and they called him father, that she joined with him in the execution of a deed in which she was described as his wife, and that during the greater part of the time they were living together her mother lived with them.

EVIDENCE—SHORTHAND RENDERING OF FACTS.—It is competent for a witness, after testifying to an acquaintance for several years with the accused, to state, in general terms, that he and the woman to whom it is claimed he was married lived together as man and wife, and that he held her out as his wife. This is not the stating of a conclusion either of law or of fact, but is a shorthand rendering of facts.

JURY TRIAL—ASSUMPTION OF FACTS BY THE COURT. Where there is no conflict in the evidence, the court may, in instructing the jury, assume it to be true, and charge upon it directly without any hypothesis.

Indictment for bigamy. The woman who was claimed to be the defendant's wife before his second marriage was called as a witness in his favor, and, while testifying that he and she lived together for thirteen years, denied their marriage. The court instructed the jury that they might look to the fact that the accused and the woman lived together for thirteen years under the same roof; that when one of the children died, he and she went to the grave together, she leaning on his arm; that they signed deeds as husband and wife—in deciding what weight to give to her testimony. To this instruction the accused excepted. The jury returned a verdict of guilty.

Coleman & Bankhead, for the appellant.

William C. Fitts, attorney general, for the state.

[82] BRICKELL, C. J. The appeal is taken from a judgment of conviction of bigamy. The second or alleged bigamous marriage was show to have been ceremonial, in strict conformity to the statutes. The prior marriage, if it existed, was to be deduced from facts and circumstances, from the cohabitation and conduct of the parties. Though there is some diversity of judicial decision upon the question, the better doctrine, and that which prevails in this state, is, that marriage, like any other fact involved in a judicial inquiry, may be proved by circumstances—direct or positive proof of the fact is not necessary: 1 Bishop on Marriage and Divorce, sec. 487; 2 Wharton on Evidence, sec. 1297; 2 Greenleaf on Evidence, sec. 461; Langtry v. State, 30 Ala. 536; Campbell v. Gullatt, 43 Ala. 57; Williams v. State, 54 Ala. 131; 25 Am. Rep. 665; Parker v. State, 77 Ala. 47; 54 Am. Rep. 43.

Numerous exceptions were reserved on the trial in the court below to the admission of the evidence, upon the ground of irrelevancy. The undisputed fact was, that the defendant and the woman alleged to be his wife, for more than ten years prior to the second marriage, had lived under the same roof, having born to them eight children. We cannot doubt that the fact that during this period she was known by his name, as were the children, that the children called him father, or by the synonym, pa; that, described as wife, she joined him in the execution and acknowledgment of a deed and of a mortgage conveying lands; and that during a large part of the time the mother of the woman resided with them, were facts admissible upon the inquiry of marriage vel non: State v. Gonce, 79 Mo. 600. And it is to the admission of evidence of these facts the objection of irrelevancy was taken in the court below.

Nor was it objectionable to permit a witness testifying to an acquaintance of several years with the defendant and the woman further to testify that they lived together as man and wife, and that the defendant held the woman out as his wife. Neither was, as is argued by counsel, the expression of a conclusion of law, or of fact. If so regarded, there is no matter which involves a combination of facts that is not liable to be called a conclusion: Massey v. Walker, 10 Ala. 288. It was no more than that which Mr. Wharton terms a "shorthand rendering of the facts": 1 Wharton on Evidence, sec. 510; Hood v. Disston, 90 Ala. 379; Cofer v. Scroggins, 98 Ala. 342; 39 Am. St. Rep. 54.

[83] The general rule is, when a question of fact is involved, dependent on oral testimony, the credibility of the evidence

must be referred to the jury; and an instruction assuming its truth is an invasion of their province and erroneous. Originally, the rule was, that if the facts were clear and undisputed, the court could charge upon them directly without hypothesis: 1 Brickell's Digest, 336. This rule was departed from in Stewart v. Russell, 38 Ala. 619, and it was held, however free from conflict, however clear and undisputed the evidence may be, it was erroneous for the court to charge upon it directly. The later decisions have not followed the lead of Stewart v. Russell, 38 Ala. 619, but their tendency is to the restoration of the original rule—to hold that when the evidence is free from conflict and is clear, the court does not err in instructing upon it directly. If the evidence is not conflicting—if it is clear, undisputed—the jury cannot disregard it, and it is difficult to conceive of any good reason for requiring the court to submit its credibility to them hypothetically. The very hypothesis would not be without tendency to induce the jury to disregard it, and, if they should disregard it, might necessitate the grant of a new trial. There is not a fact referred to by the court in that part of its charge to which an exception was reserved, not fully and clearly proved—not one as to which there was any conflict of evidence—not one which was denied by the defendant in testifying for himself, and we are unwilling to say the court invaded the province of the jury in charging upon these facts without hypothesis: Marx v. Leinkauff, 93 Ala. 453-464. The want of consistency of the evidence of the woman with these undisputed facts affected her credibility, as the want of harmony with undisputed facts affects the credibility of any witness.

The locality or venue of the offense was fully proved. The evidence does not, as is insisted in support of the general affirmative charge requested by the defendant, leave the fact in doubt or uncertainty—it is not referable to any other county than to the county of Walker in this state.

We find no error in the record, and the judgment must be affirmed.

BIGAMY—PROOF OF FORMER MARRIAGE.—While there is a distinct conflict of authority upon the question, the weight both of authority and reason supports the holding of the principal case, and maintains that in prosecutions for bigamy the former marriage of the defendant may be established by proof of his conduct, cohabitation, and declarations that the woman with whom he was living was his wife. A marriage thus established, if believed by the jury, is sufficient basis for a conviction, without other evidence of an actual, solemnized marriage: See monographic note to Hiler v. People, 47 Am. St. Rep. 228.

INSTRUCTIONS ASSUMING FACTS TO BE TRUE.—An instruction assuming that there is no evidence tending to establish a proposition is not ground for reversal if such is the case: Sharp v. Parks, 48 Ill. 511; 95 Am. Dec. 565; Heirn v. McCaughan, 32 Miss. 17; 66 Am. Dec. 588; Fahey v. State, 27 Tex. App. 146; 11 Am. St. Rep. 182.

COX *v.* STATE.

[117 ALABAMA, 103.]

BIGAMY.—THE CONTINUANCE OF BIGAMOUS COHABITATION DOES NOT NECESSARILY INVOLVE CONTINUING SEXUAL INTERCOURSE.—The man is guilty of this offense by living with the woman, apparently and confessedly as husband and wife, he having a wife living, though the woman with whom he so lived had become incapable of sexual intercourse, and for that reason it had been discontinued several years, this fact being, however, unknown to the public.

DEFINITION.—MATRIMONIAL COHABITATION IS the living together of a man and a woman, ostensibly as husband and wife, with or without sexual intercourse between them.

BIGAMY.—To bigamy sexual intercourse between the parties is essential; but the continuance of such intercourse is not indispensable to the continuance of bigamous cohabitation.

Tally & Proctor, for the appellant.

William C. Fitts, attorney general, for the state.

104 BRICKELL, C. J. The indictment is founded on the last clause of section 4406 of the Criminal Code of 1896, which in its entirety reads: "If any person, having a former husband or wife living, marries another, or continues to cohabit with such second husband or wife in this state, he or she must, on conviction, be imprisoned in the penitentiary for not less than two nor more than five years." The statute was originally enacted as part of the Penal Code of 1841 (Clay's Digest, secs. 4, 5, p. 432), and, with changes of verbiage and structure not affecting its construction, has been incorporated in all subsequent revisions or codifications of the statute: Code 1852, secs. 3232, 3233; Rev. Code 1867, secs. 3599, 3600; Code 1876, secs. 4185, 4186; Crim. Code 1886, secs. 4016, 4017; Crim. Code 1896, sec. 4406. In Beggs v. State, 55 Ala. 108-110, the first case in which it became necessary to construe the statute, it was said: "When this statute is read in connection with the common law existing at the time of its enactment, it is apparent two offenses are thereby created; or, rather, the common-law offense of bigamy is declared, and the punishment which must follow conviction defined; and a statutory offense, the continuance of cohabitation under the vicious marriage making bigamy,

punishable as the latter offense, is created. The offense of bigamy remains, indictable and punishable at the place of its commission. If the second marriage was in this state, the county of its commission is the only place in which an indictment for the offense will lie. As to this offense, the common law is not changed. Necessity for a change is obviated by the creation of the new offense—the cohabitation under the second marriage. If the marriage was in another state, and the cohabitation in this state, the wrong done here is the evil example of persons living together as husband and wife, who do not in fact and in law sustain that relation—the open continuance of an adulterous connection."

105 The evidence, without conflict, shows that the defendant, having a wife living, he and she being residents of the county of Jackson in this state, married Margaret Hughes in the state of Tennessee, subsequently living with her as his wife in the county of Jackson, then removing to the state of Tennessee, and there living with her as his wife. About five weeks before the finding of the indictment, they returned to the county of Jackson, lived together as man and wife under the same roof, occupied the same bed, acknowledging each other as husband and wife, and in all respects so conducted themselves in the presence of the community. The defendant introduced evidence tending to show, that six or seven years prior to the trial, said Martha, by reason of a serious surgical operation to which she had been compelled to submit, was incapacitated from sexual intercourse, and since the operation he had not had sexual intercourse with her, and for more than three years had not had such intercourse with her in the county of Jackson. Upon this phase of the evidence, the defendant requested several instructions, basing the right to an acquittal upon the proposition that continuous sexual intercourse is an indispensable element of the statutory offense.

We do not doubt that sexual intercourse is a necessary ingredient of the statutory offense. From its original enactment, through all subsequent revisions or codifications of the statute, the statute has been associated with other statutes creating or declaratory of offenses, of which such intercourse is the essential criminating element. Originally, it was associated with the statute denouncing the offense of a man and woman living together in adultery or fornication, and the statute defining incest and fixing its punishment: Clay's Digest, secs. 2-6, pp. 429, 430. Without now tracing the statute through sub-

sequent revisions or codifications, it will be found in the Criminal Code of 1886, sections 412-419, associated with the statutes in relation to incest, living in adultery or fornication, seduction, and miscegenation.

Apart from the association of the statute with other statutes, the terms of the statute, "continues to cohabit with such second husband or wife," imply or involve sexual intercourse. The word "cohabit," and its derivation "cohabitation," are words of large signification. "Cohabit," [106] in its general sense, is defined in the Century Dictionary, "to dwell together; inhabit or reside in company, or in the same place of country." And a specific definition is, "to dwell or live together as husband and wife; often with reference to persons not legally married, and usually, but not always, implying sexual intercourse." There is a corresponding definition of "cohabitation." In Rawle's Bouvier's Law Dictionary, Rawle's edition, "cohabit" is defined "to live together in the same house, claiming to be married"; and when used without reference to the relation of the parties as husband and wife, the definition is, "to live together in the same house." Mr. Bishop's definition of cohabitation is: "To cohabit is to dwell together. Matrimonial cohabitation is the living together of a man and woman ostensibly as husband and wife"; Bishop on Marriage and Divorce, sec. 777. And from such cohabitation, he adds, "the carnal act is presumed": 2 Bishop on Marriage and Divorce, sec. 628.

It is one proposition to assert that sexual intercourse is a necessary element of the statutory offense, and quite another to assert that it must be continuous—that it must attend the whole period of time during which the parties live together ostensibly as husband and wife. The question was very fully discussed and considered in Cannon v. United States, 116 U. S. 55. The third section of the act of Congress for the suppression of polygamy, reads: "That if any male person in a territory or other place over which the United States have exclusive jurisdiction hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor," et cetera. Cannon was indicted for a violation of this act, and sought to defend upon the ground that he did not have sexual intercourse with the woman with whom he was dwelling after the enactment of the act. The court said: "The principal question argued at the bar was the proper construction of section 3 of the act of 1882. That question depends upon the meaning of the word 'cohabit' in the section. The meaning contended for by the defendant

is indicated by his offer to show by Clara D. Cannon nonaccess, and facts to rebut the presumption of sexual intercourse with her, and the actual absence of such intercourse, and by requests for instructions to the jury, which are based on the view that the word 'cohabit' necessarily implies the idea of having sexual 107 intercourse. But we are of opinion that this is not the proper interpretation of the statute; and that the court properly charged the jury that the defendant was to be found guilty if he lived in the same house with the two women, and ate at their respective tables one-third of his time or thereabouts, and held them out to the world, by his language or conduct, or both, as his wives; and that it was not necessary it should be shown that he and the two women, or either of them, occupied the same bed or slept in the same room, or that he had sexual intercourse with either of them. It is the practice of unlawful cohabitation with more than one woman that is aimed at—a cohabitation classed with polygamy and having its outward semblance. It is not, on the one hand, meretricious unmarital intercourse with more than one woman. General legislation as to lewd practices is left to the territorial government. Nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy when direct proof of the existence of these relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the act was passed, and without reference to what may occur in the privacy of these relations. Compact for sexual nonintercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates."

By the bigamous marriage in Tennessee, sexual intercourse was contemplated and followed in this state, and in the county of Jackson, originally. It is true that, prior to the finding of the indictment, the statute of limitations had operated a bar to a prosecution for the original vicious cohabitation. But the parties returned to this state, living under the same roof, acknowledging each other as husband and wife, and presenting to the community every indicia of that relation. The "carnal act" may not have been committed; that was prevented by the in-

capacity of the woman, not by the desire or intent of the parties to abstain from it. If capacity had [108] been restored, it would have been resumed. The incapacity, so far as may be inferred from the evidence, was a fact known only to the parties—it was not known in the community in which they were dwelling together. Cases may possibly occur in which parties may abandon cohabitation—a living together ostensibly as husband and wife; as parties may abandon living together in adultery or fornication, and they may continue under the same roof. But in such cases, to relieve from criminality, there must be such external evidence of the abandonment, as will neutralize the appearance to the community of the open and demoralizing example of living in an illicit relation. The law intends to preserve and promote the institution of marriage, to prohibit pretenses, or false assumptions of its existence, and to prevent the public scandal and disgrace following the living in that ostensible relation.

There was no error in the refusal of the instructions requested by the defendant, and the judgment of the court below must be affirmed.

BIGAMY—ESSENTIALS OF CRIME—COHABITATION.—The offense of bigamy is committed by the second marriage; after that time the offense is complete. Cohabitation is not necessary to constitute the offense. The parties may immediately separate after the second marriage has been consummated, and they will then be guilty of bigamy: See monographic note to State v. Johnson, 93 Am. Dec. 252. See Nelms v. State, 84 Ga. 466; 20 Am. St. Rep. 377.

PAINTER *v.* MUNN.

[117 ALABAMA, 322.]

ATTACHMENT BOND—BREACH OF, WHAT IS.—If any ground exists for an attachment, it is not wrongfully sued out, and there is no breach of the attachment bond, though the ground stated in the affidavit for the attachment cannot be maintained. Therefore, in an action upon such a bond, the plaintiff must state in his complaint that no ground for the attachment existed. If exemplary damages are sought, the complaint must, in addition to showing that the attachment was wrongfully sued out, negative the sworn ground upon which the attachment was issued and aver that it was sued out without probable cause to believe the sworn ground to be true.

ATTACHMENT, WRONGFULLY SUING OUT—MITIGATION OF DAMAGES.—In an action for wrongfully suing out an attachment, the defendant is entitled to plead, in mitigation of damages, that the plaintiff replevied the goods levied upon and afterward sold them and applied their proceeds to the payment of the debt due the defendant.

PRACTICE.—A PLEA STATING FACTS DISCLOSED BY THE COMPLAINT is unnecessary and improper. If the elements of damage, as claimed by the complaint itself, are not recoverable, the proper way to raise this objection is by motion to strike out, by objection to the evidence offered to prove damages, or by a request for proper instructions to the jury.

ATTACHMENT.—THE FRAUDULENT DISPOSITION OF HIS INDIVIDUAL PROPERTY BY A PARTNER is not a fraudulent disposition of the property of the partnership, and does not of itself constitute a ground for suing out an attachment against the partnership by one of its creditors. In an action by the partnership for wrongfully suing out the attachment against it, it is no defense that one of the partners fraudulently disposed of his individual property.

PARTNERSHIP—CONSENT OR RELEASE BY ONE PARTNER ONLY.—In an action for wrongfully suing out an attachment against a partnership, it is no defense that one of the partners assented to such attachment. The partnership cannot be deprived of the right to redress wrongs committed against it by an estoppel or release of one of its members.

PARTNERSHIP—ACTION, WHEN DEEMED TO BE IN BEHALF OF AND NOT OF ITS MEMBERS AS INDIVIDUALS.—A complaint describing the plaintiffs as A, B, and C, late partners doing business under the name of A, B & Company, must be deemed to be for the enforcement of a partnership obligation, and not as in support of an action commenced by the members as individuals.

ATTACHMENT BOND—JOINDER OF PARTIES.—All the obligees in an attachment bond must be joined as plaintiffs in the capacity in which they are named for the use of such as claimed to have been injured.

PRACTICE—VARIANCE.—If a complaint by three persons styling themselves as late partners seeks to recover upon an attachment bond, which it describes as being payable to the plaintiffs, and such bond, upon being offered in evidence, appears to have been in favor of the partnership and also in favor of the three members as individuals, there is a fatal variance, and the jury should be instructed to find for the defendants.

Action by Dan Munn, George Munn, and Tom Edwards, partners, against W. R. Painter and others, sureties on an attachment bond, in an action by J. S. Reeves and Co. against the plaintiffs in this action. After the attachment was levied, the property seized was replevied and taken into the possession of the plaintiffs in the present suit, who sold and converted it into money, and afterward paid such money toward the satisfaction of the judgment recovered against them in the attachment suit. Judgment for the plaintiffs. The questions involved sufficiently appear from the opinion of the court.

Sollie & Kirkland, for the appellants.

Borders & Carmichael and A. A. Evans, contra.

334 BRICKELL, C. J. This was an action on an attachment bond to recover damages for the breach thereof by wrong-

ful suing out of the attachment. The original complaint and the second count of the amended complaint were withdrawn, and the trial was had on the first count of the amended complaint. In this count, which claims actual damages only, the only breach assigned is, "the said attachment was wrongfully sued out in this, because the said [plaintiffs] were not about fraudulently to dispose of their property as alleged in the affidavit in said attachment suit." The defendant demurred to this count on the grounds that it did not deny that the debt for which the attachment was sued out was due, and failed to aver that no ground existed for the suing out of the attachment, and the overruling of the demurrer is one of the errors assigned. One of the conditions of an attachment bond is, that the obligors shall pay to the defendant in the attachment all such damages as he may sustain by the wrongful or vexatious suing out of the attachment. In an action on such bond, the defendant is not confined in his defense to proof of the existence of the particular ground of attachment averred in the affidavit, but may show the existence of any statutory ground. If any such ground existed, the attachment was not wrongfully sued out, and there was consequently no breach of the bond in this respect, if there was a valid debt due from the defendant to the plaintiff: Gabel v. Hammerwell, 44 Ala. 336; Lockhart v. Woods, 38 Ala. 631. Hence, when only actual damages are sought, and the fact of the indebtedness is not denied, the complaint should, in some form, negative the existence of any statutory ground for the suing out of the attachment, since the bond is not broken unless the attachment was wrongfully sued out, and the nonexistence of the particular ground averred in the affidavit, or of any particular ground, does not render the attachment wrongful: Crofford v. Vassar, 95 Ala. 548; McLane v. McTighe, 89 Ala. 411. When exemplary damages are claimed the complaint, in addition to averring that the attachment was wrongfully sued out, must negative the sworn ground upon which the attachment issued, and aver that it was sued out without probable cause for believing the sworn ground to be true: City Nat. Bank v. Jeffries, 73 Ala. 183; Schloss v. Rovelsky, 107 Ala. 596. [335] But this averment is not necessary where only actual damages are claimed: McLane v. McTighe, 89 Ala. 411. An averment in the complaint that the attachment was wrongfully sued out, "because the said [plaintiffs] were not about fraudulently to dispose of their property as alleged in the affidavit," is equivalent only to an averment of the nonexistence

of the particular ground upon which the process issued. It is not equivalent to an averment that the attachment was wrongfully sued out, since other grounds may have existed, and if any other ground did exist the attachment was not wrongful. It does not, of consequence, show any breach of the bond. To require the defendant to take issue on such averment would deprive him of a legal defense—the existence of some other statutory ground for the suing out of the attachment. This being the only assignment of the breach, the complaint fails to show that there has been any breach of the bond, and the demurrer should have been sustained.

The complaint claimed as damages the value of the property seized under the writ, and the defendant pleaded in mitigation of damages that plaintiff had replevied the goods levied on, and had afterward sold them and applied the proceeds to the payment of the debt due defendant. There was a demurrer to this plea on the ground that these facts could not be considered in mitigation of damages, which demurrer was sustained. In Hundley v. Chadick, 109 Ala. 575, it was held, after a careful consideration of the question, that in an action on an attachment bond for the wrongful suing out of the attachment, the fact that the attached property, which had been taken from the defendant, and had not been replevied nor returned to him, brought its fair value when sold under the order of the court, and that the proceeds of its sale had been applied to the payment of the debt of the defendant, constituted no bar to the action, and was not matter in mitigation of damages. We adhere to this principle, and its enforcement is necessary in order to prevent the abuse of the process of attachment. If the plaintiff in the attachment proceedings be permitted to make this defense when sued on his bond, the restraints imposed by statute for the purpose of preventing an abuse of the process, would be useless. But when the defendant in the attachment suit replevies the [336] property, thereby retaining the possession and enjoyment of it, and himself sells it, in his own way and on his own terms, and with the proceeds pays the debt, the reason on which the principle rests ceases, and the principle becomes inapplicable. The replevy and sale of the property in such case is not the necessary result of the suing out of the attachment, but is the voluntary act of the defendant, done for his own convenience and benefit to prevent the injury which would result from a failure to replevy. He may or may not replevy, or, having replevied, may or may not sell the property, and pay the

debt, and the mere right to do so, which the statute grants him, and the contingency of his exercising the right, cannot lessen the influence upon a creditor of those statutes which require him to give bond for the payment of all such damages as may result from the abuse of the process. When property levied on by attachment is restored to the defendant without having been replevied, the damages recoverable include, not the value of the property, but the value of its use during the detention, together with such other actual damages as may be shown, and such, we believe, should be the rule when the defendant replevies the property and sells it. We are of the opinion that when property seized under a writ of attachment is replevied by the defendant, who afterward sells it, and with the proceeds pays the debt to enforce which the attachment was sued out, these facts may be pleaded in mitigation of damages in an action on the attachment bond. But, in the present case, all the facts averred in the plea were alleged in the complaint, and were, therefore, admitted facts upon which no issue could be taken, except to deny their truth, which was not the purpose of the plea. The plea, therefore, raised no issue and was unnecessary to enable the defendant to obtain advantage of the facts set forth therein. When an element of damages is claimed, which the complaint itself shows is not recoverable, the proper way to raise this objection is by a motion to strike, or by objection to evidence offered to prove the damages, or by request for proper instructions to the jury: Treadwell v. Tillis, 108 Ala. 262; Kennon v. Western Union Tel. Co., 92 Ala. 399. The sustaining of the demurrer was not an error of which appellant can complain.

337 Although each member of a partnership is, generally speaking, liable for all the debts of the firm, and the voluntary conveyance by one partner of his individual property may be fraudulent as to the partnership creditors, and, if fraudulent, will authorize such creditors to follow up and subject to the payment of their claims the property thus fraudulently conveyed, or to sue out an attachment against such partner, yet such fraudulent disposition of his individual property by one of the partners is not a fraudulent disposition of the partnership property, and does not, of itself, constitute a statutory ground for the suing out of an attachment against the partnership by a partnership creditor: Bates on Partnership, sec. 1117. In an action by a partnership, or by the members thereof as partners, on an attachment bond seeking damages only for the injuries

done by the wrongful seizure of the partnership property, it is no defense that one of the partners had fraudulently disposed of his individual property. For this reason charges A, B, 3, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16, requested by appellants, were properly refused.

There was evidence tending to show that one, at least, of the partners consented to the suing out of the attachment, and upon this evidence a charge was requested that, if the jury believed the evidence, they must find for the defendants. It is not contended that the consent of one partner to the suing out of an attachment against the partnership bound the partnership, but that, one of the partners having by his consent disabled himself to sue on the bond, there can be no recovery by the others, because all must recover, or none can. Although it is a principle of law that if two or more unite in bringing an action, all must recover or none can, and that if one has disabled himself to maintain the suit, this precludes the others from recovering, it has been expressly held by this court in Fancher v. Bibb Furnace Co., 80 Ala. 481, overruling a former decision to the contrary in Cochran v. Cunningham, 16 Ala. 448, 50 Am. Dec. 186, that this principle does not apply in a suit by a partnership, and that the partnership cannot thus be deprived of the right to collect its assets, or to redress wrongs committed against it, because of the estoppel against or remittitur by one of the partners.

In considering all the charges we have treated the [338] action as one instituted by the members of the partnership of Edwards & Munn Brothers, as partners, to redress a wrong done to the partnership, and not as a suit by them as individuals to recover for the wrong done to each individually, as counsel for appellants insist it should be treated. The plaintiffs are described in the caption of the original complaint as "Dan Munn, George Munn, and Tom Edwards, late partners, doing business under the firm name of Edwards & Munn Brothers," and the summons followed the complaint. The caption of the amended complaint, as it appears in the record, omitted the word "late," but was in other respects the same. This is a proper description of the plaintiffs in a suit by a partnership, or by the members thereof as partners, to recover partnership assets, and there is nothing in the body of the complaint to indicate that the plaintiffs sue as individuals. The bond sued on was made payable to Dan Munn, George Munn, Tom Edwards, and to Edwards & Munn Brothers. It was properly so made because in the com-

plaint and affidavit in the attachment proceedings, both the partnership and the individual members were made parties defendant, and when the attachment proceedings are against a partnership and the individual members thereof, the statute authorizes the property of each partner, as well as that of the partnership, to be seized, and the writ so directs: Code 1886, sec. 2947. The bond, therefore, was an obligation to indemnify each of the partners individually, in the event of a levy on his individual property, and the partnership and members thereof as partners, in the event of a levy on partnership property. But the complaint avers that the bond was payable to "plaintiffs," and, as we have seen, the plaintiffs are the members of the firm as partners, or the partnership. This was a fatal variance, and entitled defendants to the general charge in their favor, which was refused: Gamble v. Kellum, 97 Ala. 677. To authorize a recovery on an attachment bond all the obligees named therein must join as plaintiffs, in the capacity in which they are named, for the use of such as claim to have been injured: Smith v. Mutual Loan etc. Co., 102 Ala. 282; Masterson v. Phinizy, 56 Ala. 336. When it appears from the complaint that all the obligees have not been joined as plaintiffs, [339] the defect should be taken advantage of by demurrer, and will be treated as waived if no demurrer is interposed. When, however, the complaint fails to show who are the obligees, and avers only, as here, that the bond was payable to "plaintiffs," then, if the bond was in fact payable to others besides the plaintiffs, objection may be made to its introduction in evidence, or a variance may be claimed and proper charges requested. There was no error in giving the charges requested by plaintiffs.

For the errors pointed out, the judgment of the court below must be reversed and the cause remanded.

ATTACHMENT BOND—SUIT UPON—MEASURE OF DAMAGES.—For sureties upon an attachment bond to avoid liability for actual damages for a wrongful levy, reasonable cause for the attachment must exist as a fact, and credible information of facts sufficient to warrant a belief in the existence of reasonable cause tends merely to disprove malice and thereby to relieve from exemplary damages: Seattle Crockery Co. v. Haley, 6 Wash. 302; 36 Am. St. Rep. 156, and note. Judgment for the defendant in an attachment suit is sufficient evidence that there was, in fact, no ground for the institution of suit; but it is not, in action on an attachment bond, conclusive evidence that plaintiff in attachment acted willfully wrong in suing out the writ, and that he had no reasonable grounds to believe what he stated in his affidavit as true: Raver v. Webster, 3 Iowa, 502; 66 Am. Dec. 96, and note. Exemplary damages may be recovered when the writ was maliciously sued out and levied: Seattle Crockery Co. v. Haley, 6 Wash. 302;

36 Am. St. Rep. 156. As to the measure of damages generally, see Dickinson v. Maynard, 20 La. Ann. 66; 96 Am. Dec. 379; Trapnall v. McAfee, 3 Met. 34; 77 Am. Dec. 152.

PARTNERSHIP CREDITORS — RIGHTS AGAINST PARTNER'S SEPARATE PROPERTY.—There exists in the United States a remarkable difference of opinion as to the rights of partnership creditors in the separate estates of individual partners. A large number of courts, following the English rule, hold that in equity joint creditors of a partnership are not entitled to resort to the separate estate of the partners, until the separate creditors have been first paid therefrom. This is opposed, however, by a number of courts which allow to joint creditors the same right to share in the separate estate of partners as is had by their individual creditors: See extended note to McCulloh v. Dashiell, 18 Am. Dec. 280-281; and also the monographic note to Smith v. Smith, 43 Am. St. Rep. 864-868.

JEFFERSON v. BEALL.

[117 ALABAMA, 436.]

EXECUTORS AND ADMINISTRATORS — JUDGMENTS AGAINST IN ANOTHER STATE.—Only the courts of the state appointing an executor or administrator have jurisdiction over him. A judgment entered against him in another state is void and cannot support an action against him in the state of his appointment. He has no capacity to sue or to defend in other states, except in some instances, when permitted by their laws to sue respecting assets there located.

Smith & Henry, for the appellant.

Boykin & Benton, contra.

439 BRICKELL, C. J. The suit is upon a judgment rendered in the state of Georgia against the executrix of a will of original probate in this state, to whom original letters testamentary were issued by the proper jurisdiction, and her husband, who by virtue of the intermarriage, became coexecutor. The force and effect of this judgment in this state is the question presented by the rulings of the court below on the demurrer to the plea of the defendants, and by the general affirmative instruction given to the jury. It seems to be settled by the weight, if not by an unbroken concurrence, of judicial authority, that a judgment rendered in a foreign jurisdiction against a domiciliary personal representative, is void, whether objection is or is not made to the exercise of jurisdiction by the foreign court, and whether the judgment is against the same or a different representative.

The accepted theory of administration is that the right and liability is purely representative, and exists only by force of the official character, and so cannot pass beyond the jurisdiction

which grants it, and reserves to itself full and exclusive authority over all the assets of the estate within its limits: Braithwaite v. Harvey, 14 Mont. 208; 43 Am. St. Rep. 625; 27 L. R. Ann. 101, and notes; Reynolds v. Stockton, 140 U. S. 254; Hopper v. Hopper, 125 N. Y. 400; Johnson v. Wallis, 112 N. Y. 230; 8 Am. St. Rep. 742; Robinson v. Robinson, 11 Ala. 947; Harrison v. Mahorner, 14 Ala. 834; Hatchett v. Berney, 65 Ala. 39.

The record affirmatively shows in this case that appellant sued and obtained the judgment against the defendants, describing them as executors, and that the present suit is upon such judgment against them, in the same capacity, in this state. The only complication or difficulty in the case arises from the fact that both suits are against the same persons who would in ordinary cases be concluded by an adverse judgment. But, in this class of cases, the defendant is not personally a party, otherwise than as a commissioned representative of the court making the appointment and for the limits of its jurisdiction, so that beyond that jurisdiction he [440] can exercise no authority or do or omit any act which will affect the due administration of the trust by the local authorities.

The objection thus goes to the power of jurisdiction of the court over the subject matter of the administration of assets in a foreign state, in the control of foreign administrators, and to the capacity of the defendant to do any act to the prejudice of the domestic administration. Consent cannot give such jurisdiction, or extend the limited authority of the administration to extraterritorial acts resulting in judgments against the assets of the estate. The domestic representative has no authority to prosecute or defend suits in foreign jurisdictions, except by the permission and authority of the particular state, and only as to assets there located. In Hatchett v. Berney, 65 Ala. 39, we announced the general rule as follows: "It is the settled doctrine of this court, and of the common law, that letters testamentary, or of administration, have no extraterritorial operation, and title derived from them extends, as matter of right, only to the personal assets which are found within the jurisdiction of the government from which they are derived." And it follows from this, an administrator, or executor, is not suable in a foreign jurisdiction—as he has no commission beyond the state line. There was, therefore, no jurisdiction in the court of Georgia to entertain the suit resulting in the judgment against the appellees as executor and executrix, by and under the laws of Alabama, and the judgment rendered in such suit is en-

tirely void, and thus cannot support an action in this state against the same or other administrators. We refer to the extended note to the case of Braithwaite v. Harvey, 14 Mont. 208, 43 Am. St. Rep. 625, 27 L. R. Ann. 101, for a full collection of authorities supporting the views expressed.

There is no error in the record, and the judgment of the lower court is affirmed.

EXECUTORS AND ADMINISTRATORS—EXTRATERRITORIAL POWERS.—A grant of administration cannot extend as a matter of right beyond the territory of the state in which it is granted: Note to Emmons v. Gordon, 62 Am. St. Rep. 742. An administrator appointed in one state can maintain no action in another unless authorized by a statute of that state: Louisville etc. R. R. Co. v. Brantley, 96 Ky. 297; 49 Am. St. Rep. 291, and note; nor can a suit be maintained against him in a foreign jurisdiction unless he has first taken out letters there: See monographic note to Shinn's Estate, 45 Am. St. Rep. 672. A judgment in one state, against an administrator appointed in another, cannot be enforced against the estate by an action in the latter state, though the administrator appeared and pleaded to the action in which such judgment was recovered, and the creditor must sue on his original cause of action: Judy v. Kelley, 11 Ill. 211; 50 Am. Dec. 455, and note.

TALLASSEE FALLS MANUFACTURING COMPANY *v.* WESTERN RAILWAY.

[117 ALABAMA, 520.]

CARRIERS, ACTION AGAINST, WHEN EX CONTRACTU.—If a complaint against carriers alleges both a consideration and a promise, the action is not ex delicto, but ex contractu.

CARRIERS, ACTION AGAINST, WHAT NECESSARY TO SUPPORT.—One suing a common carrier to recover for a loss must show delivery of the goods to the carrier, an undertaking on his part, express or implied, to transfer them, and a failure to perform his contract or duty. If the contract is express, it must be proved, whether the action is in tort or in assumpsit.

CARRIERS—PROOF OF CONTRACT WITH.—Oral evidence of a contract cannot be substituted for written when it has been put in writing.

CARRIERS.—THE BILL OF LADING MUST BE TAKEN AS THE SOLE EVIDENCE of the final agreement of the parties, and, where it exists, parol evidence is inadmissible either to show a delivery of the goods or a contract for their carriage.

Action to recover for an alleged breach of a contract to carry goods. They were destroyed by fire while on the defendant's premises. Page 793 of the Code of Alabama prescribes the statutory form of a complaint against a carrier, which form is as follows:

"A. B., plaintiff,
vs.
C. D., defendant.

"The plaintiff claims of the defendant ——— dollars damages, for the failure to deliver certain goods, viz: ———, received by it as a common carrier, to be delivered at ———, for a reward, which he failed to deliver."

The first count of the complaint was in the statutory form, and the second count claimed ten thousand dollars damages for the breach of the contract, whereby the defendant received of the plaintiff two hundred bales of cotton, to be carried to Cowles Station, and there safely kept until delivered to plaintiff. During the examination of a witness on behalf of the plaintiff, it was shown that a bill of lading had been issued by the defendant corporation. It objected to any evidence concerning the receipt, shipment, and burning of the cotton unless plaintiff offered its bill of lading. This it declined to do, though admitting such bill was in its possession. This objection was at first overruled, but subsequently the evidence objected to was excluded on motion, and a nonsuit entered against plaintiff. It moved to set aside such nonsuit.

Tompkins & Troy, for the appellant.

George P. Harrison, contra.

[523] HARALSON, J. 1. The first count in the complaint follows form 15, page 793, of the code of 1886, for a suit "on a bill of lading of a common carrier." Hutchinson in his work on Carriers, section 744, referring to the character of this action, states that in former times it was a very perplexing question how the form of the action—whether in case of assumpsit—should be distinguished, and adds that it seems "to be finally settled that while the allegation of a promise in the declaration will not be sufficient to impress upon it the distinctive feature of a declaration upon the contract, because the words 'agreed,' 'undertook,' or even the more significant word 'promised,' must be treated as no more than inducement [524] to the duty imposed by the common law, yet if there be an averment of a promise and a consideration, the declaration must be construed to be upon the contract, and not for the breach of duty," The count under consideration alleges both a consideration and a promise. In keeping with the principles thus announced, we have held, more than once, and latterly, that this form of action

is one ex contractu and not ex delicto, and to such conclusion we adhere: Holland v. Southern Exp. Co., 114 Ala. 128; McDaniel v. Johnston, 110 Ala. 526; McCarthy v. Louisville etc. R. R. Co., 102 Ala. 193; 48 Am. St. Rep. 29; Alabama Great Southern R. R. Co. v. Eichofer, 100 Ala. 227.

2. The second count declares on the contract itself, and cannot be pretended to be in case. Such a count could not be joined with one in assumpsit: 3 Brickell's Digest, sec. 57, p. 704.

3. Where one sues a common carrier by reason of the default of the latter, whereby an injury or loss has happened to him, whether the action be based on a breach of duty or upon the contract, it is "necessary for the plaintiff to show a delivery of the goods to him, an undertaking or contract on his part, either express or implied, to transport them as alleged, and a failure to perform the contract or his duty according to his understanding": Hutchinson on Carriers, sec. 795. Again, the same author says: "The contract with the carrier may be express or implied. If it be express, it should be proven, whether the action be in tort or assumpsit," et cetera: Hutchinson on Carriers, sec. 762.

Mr. Greenleaf, on the same subject, says: "Oral proof cannot be substituted for the written evidence of any contract, which the parties have put in writing. Here, the written instrument may be regarded, in some measures, as the ultimate fact to be proved, especially in negotiable securities; and, in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction": Greenleaf on Evidence, sec. 87.

"In the transportation of freight [as this court has said in Louisville etc. R. R. Co. v. Fulgham, 91 Ala. 556], the bill of lading embodies the contract between the shipper and the carrier, and, when delivered by the carrier and [525] received by the shipper, its terms, stipulations, and conditions are as binding on the parties thereto as are the terms, stipulations, and conditions of any other written contract. A bill of lading is, therefore, to be taken as the sole evidence of the final agreement of the parties, by which their duties and liabilities must be regulated, and parol evidence is inadmissible to vary its terms or legal import."

It is manifest from what has been said that the lower court

did not err in excluding the evidence offered by the plaintiff. Affirmed.

CARRIERS—ACTIONS AGAINST—FORM OF.—A petition does not unite causes of action arising ex contractu and ex delicto when it alleges that defendants agreed to transport certain goods for plaintiff, and then sets forth specifically acts constituting their negligence and default, by which goods were lost. In such case, the portion specifying negligence may be treated as surplusage: Kelly v. Benedict, 5 Rob. 138; 39 Am. Dec. 530. Courts are inclined to consider as founded in tort actions against carriers to recover damages for private injuries, unless a special contract very clearly appears to be made the gravamen and object of the complaint in the declaration: New Orleans etc. R. R. Co. v. Hurst, 36 Miss. 660; 74 Am. Dec. 785. See Baltimore etc. Ry. Co. v. Kemp, 61 Md. 619; 48 Am. Rep. 134.

CARRIERS—ACTIONS AGAINST—COMPLAINT.—A petition in an action against a common carrier alleging the delivery and loss of the property through negligence in managing and operating the train, is sufficient: McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343; 1 Am. St. Rep. 721. See Independence Mills Co. v. Burlington etc. Ry. Co., 72 Iowa, 535; 2 Am. St. Rep. 258.

CARRIERS—ACTIONS AGAINST—TERMS OF CONTRACT—EVIDENCE.—A bill of lading is both a receipt and a contract. As a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, it is a merger of prior and contemporaneous agreements of the parties, and, being in writing, cannot be explained nor its legal effect changed by parol evidence in the absence of fraud or mistake: Morgantown Mfg. Co. v. Ohio etc. Ry. Co., 121 N. C. 514; 61 Am. St. Rep. 679, and note.

HESS *v.* RUDDER.

[117 ALABAMA, 525.]

POSSESSION, TO BE ADVERSE, must be under a claim of right, and there can be no adverse possession without an intention to claim title.

ADVERSE POSSESSION OF COTERMINOUS OWNER.—If one occupies land up to a certain fence because he believes it to be the line of his land, but without an intention to claim up to the fence if it should be beyond his line, his possession is not adverse if his belief proves to be mistaken.

BOUNDARY LINES—PRACTICAL LOCATION OF AND ADVERSE POSSESSION UNDER.—If a survey is made for the purpose of locating a boundary between two tracts of land, the persons intending to purchase them being then present, and they subsequently purchase the lands and take and hold possession of their several tracts according to such survey, the possession of each must be deemed adverse to the other, though it is afterward discovered that the survey is incorrect. It must be presumed that each intended to claim title up to the line of the boundary as thus surveyed.

BOUNDARIES.—IN CONSTRUING A DESCRIPTION of land, natural or artificial monuments control courses and distances.

Martin, Bouldin & Ashley, for the appellant.

Tally & Proctor, contra.

527 BRICKELL, C. J. This was an action of ejectment instituted by appellee in February, 1897, to recover a fifty-acre tract of land in Jackson county, and arose out of a dispute between the owners of coterminous estates as to the division line between them. The plaintiff disclaimed possession of all that part of the land sued for lying west of a designated line, and pleaded not guilty as to the land lying east of said line. The land in controversy, as thus limited by the pleadings, consists of a narrow strip containing four or five acres, and the chief defense relied on was the adverse possession of said strip by defendant for the statutory period. The real point of contention in this court is, whether the possession of the defendant up to the line west of which he disclaimed possession was adverse in its character; the evidence in the record, even that of the plaintiff, 528 showing beyond question that it had all those other elements which, when coupled with a hostile claim of right, vest a perfect title in the holder—being actual, open, notorious, exclusive, and continuous for a period of more than ten years.

We have frequently had occasion to consider the question as to when the possession of a coterminous landowner becomes adverse to his neighbor, and to determine the rule applicable to the facts of particular cases. Possession, to be adverse, must be held under a claim of right, and there can be no adverse possession without an intention to claim title. Hence it is essential to the proper determination of the character of the possession to consider the intention with which it was taken and held. If one occupies land up to a certain fence because he believes that to be the line of his land, but not having any intention to claim up to the fence if it should be beyond the line, the intent to claim title does not exist coincident with the possession, and the possession up to the fence is not, therefore, adverse. Where, however, the coterminous owners agree upon a line as the dividing line and occupy up to it, or when one of them builds a fence as the dividing line and occupies and claims to it as such, with knowledge of such claim by the other, the claim is presumptively hostile and the possession adverse: Brown v. Cockerell, 33 Ala. 38; Alexander v. Wheeler, 69 Ala. 340; Hoffman v. White, 90 Ala. 354; Davis v. Caldwell, 107 Ala. 526. Although adverse possession is a fact, the burden

of proving which rests on him who asserts it, yet the circumstances under which the possession was taken and held not infrequently give rise to a prima facie presumption of its adverse character, and dispense with any further proof in this respect, in the absence of any rebutting evidence to the contrary. An agreement between coterminous owners establishing the line, or the building of a fence by one of them under the circumstances above stated, accompanied by occupancy up to the line or fence, gives rise to such presumption, because possession taken under such circumstances is inconsistent with the idea that it is held otherwise than under a claim of right. But these are not the only facts that create this presumption, even where the dispute is between coterminous owners. Any practical location by them of the division line, although there may be no express [529] agreement, followed by occupancy up to the line located, may, under particular circumstances, have the same effect. If one buy a house pointed out to him, pay for it and immediately go into possession under his deed, believing it to be the one described therein, such possession would be presumptively adverse, although the deed described a different house, and the law will so pronounce it if there be no rebutting testimony. So, if one, while negotiating for a tract of land, and before the purchase thereof, have pointed out to him by the owner one of the boundaries separating it from the adjoining tract, and, after purchasing it, be put into possession and occupy up to the boundary line thus pointed out, believing it to be the true line, such occupancy would be presumed to be under a claim of right; the circumstances under which it was taken, in the absence of rebutting testimony, leaving no room for mere inference not based on facts in evidence that it was otherwise. We are of the opinion, after a careful consideration of the evidence in this case, that it shows without conflict that the possession of Hess, the appellant, was adverse during the whole period from 1883 up to the commencement of this action, and, since it was not lacking in any of the other essential elements, the defendant was entitled to the general charge in his favor. In the fall of 1882, appellee's husband, Rudder, was negotiating with one H. J. Cheney, for the purchase of the fifty acre tract of land described in the complaint. At the same time appellant was negotiating with Cheney for the purchase of the adjoining tract. After Rudder had closed the trade, but before Hess had done so, and before deeds had been made to either, Cheney had the county surveyor run the lines of the

fifty-acre tract, including the boundary line in dispute. Both Rudder and Hess were present when these lines were run and the division line established, and assisted in running them. When the last corner, on the south bank of the river at one end of the disputed boundary, was established, the surveyor directed Rudder to drive a stake there, which he did, and after some figuring said he had made an error and would not complete the work that evening. The next morning he went to the line with Rudder's son and hacked the trees through the wooded part of the line. Whether he surveyed a new line, and, if so, whether it differed from the line [530] run the day before, is not positively shown by the evidence, but Rudder testifies, "I learned that he went down the next morning and marked the line by hacks on the trees." The inference is, that no new line was run and that the trees hacked were on the line run the day before in the presence of Hess and Rudder. After the survey deeds were made to Rudder's wife and Hess, that to the former was dated November 1, 1882, and that to the latter, December 25, 1882, and each went into possession of the land purchased by him. In the following spring, 1883, Rudder suggested to Hess that they erect stones at the corners of the division line, and a day was agreed upon between them to meet and do so. On the day named, Hess, failing to appear, Rudder set the stones. At the south end of the line, at the foot of the mountain, there was no stake marking the corner, but he placed the stone at what he believed to be the corner, and he testified that he "saw marked trees in line with the corner so set up." At the north end, on the river bank, he found lying on the ground the stake he had driven at the direction of the surveyor, and he set up the stone at that point, believing it to be the corner established by the surveyor. In 1883 he made a turning row from the stone on the river bank across the cleared land on a line with the stone at the foot of the mountain. In the spring of 1885 Rudder asked Hess to help build a fence on the line, and the latter told him to build a fence through the cleared land next to the river, and he would build a temporary brush fence through the wooden part until the briars and thickets were cleared off, and then he would build a fence on the line. Rudder built the fence on the turning row previously made by him, and the same has remained unchanged since then, and afterward Hess built a wire fence along the rest of the line, fastening it to the marked trees. In 1886, and at other times, these wires became detached on account of drifts

from the river piling against them during freshets, and were temporarily fastened to other trees, sometimes off the line, but finally the wires were attached to stakes driven on the line from the stone on the river bank to that at the foot of the mountain set up by Rudder. Both parties always regarded this as the true line from the time it was first established as above stated, and each occupied and cultivated up to it until the institution of this suit. [531] There seems to have been no express agreement as to the true line other than such as may be inferred from the circumstances above set forth, but neither party ever doubted it was the true line until a survey was made just before the commencement of this action. These facts are undisputed and are taken chiefly from appellee's evidence as it appears in the record. Although there was no express agreement fixing the dividing line, they have equal efficacy, and are entitled to equal, if not greater, weight in determining the character of the possession of each. They show that each negotiated for land bounded by this line, and not for land bounded by an unknown line described in a deed, that they bought up to this line, paid for land extending to this line, occupied and cultivated up to it, believing it to be the line described in the deeds, built a common fence on it, and never questioned its being the true line for a period of fourteen years. From them follows the presumption, which must prevail in the absence of rebutting testimony, that each intended to claim title up to this line regardless of the line described in the deeds, and that the possession of each was under claim of title and therefore adverse. There is no room under these facts, unrebutted, for an inference that they did not intend to claim up to this line if it should prove to be beyond the true line. Whatever may have been the description in the deeds, this was in fact the true line, since it was land bounded by this line that they bought, and if any other line was described in the deed, it was an erroneous description, capable of reformation in a court of equity under the facts shown in this case. The defendant testified that "he did not intend to claim Mrs. Rudder's land," but further said, he did not mean by saying he "did not intend to claim Mrs. Rudder's land, that he did not claim to the line from rock to rock; the line was run and marked and located before he bought the land, and he bought to that line and claimed it as his own regardless of anybody. He knew it was the line when he bought the land, and he claimed his own land, not Mrs. Rudder's." This testimony does not, as contended by counsel, show an

intention to claim up to the line only in the event it should be the true line, and does not rebut the presumption arising from the facts stated; but, on the contrary, indicates an intention to claim to [532] the line from rock to rock, regardless of the line described in the deed. It tends to strengthen, rather than to weaken the presumption. The court erred in refusing to give the general charge in favor of the defendant at his request.

Moreover, the deed under which plaintiff claimed title to the strip in controversy, together with the evidence offered in connection with it, fails to show that said strip is embraced in the description therein. The second and third calls of the deed are from a point on a public road, "thence along the same so as to make a distance of 67 poles and 8 links on a bearing of north 41 degrees east; thence north 49 degrees west 132 poles to the back of the Tennessee river." Just prior to the commencement of this suit plaintiff had the land surveyed by the county surveyor, after notice given to the defendant, who, as a witness for plaintiff, testified that instead of running the line along the public road, or on a bearing of north 41 degrees east, as the deed called for, he ran it north 54 degrees east, for the required distance, a variation of 13 degrees from the course mentioned in the deed, but how far from the road does not appear; and that he did this in order to reach a point just 132 poles from the top of the river bank. In construing descriptions of boundaries to land it is a general rule that natural or artificial monuments shall control courses and distances: Crampton v. Prince, 83 Ala. 246; 3 Am. St. Rep. 718. One of the boundaries of the land conveyed by this deed must, therefore, be regarded as the public road mentioned therein, along which the line must run for a distance of 67 poles and 8 links, and from the termination of this line a line running north 49 degrees west to the bank of the Tennessee river, that is, to the ordinary stage of the water, must constitute another boundary, whether the distance to this point be 132 poles, or more or less. The survey made by the county surveyor, departing as it did 13 degrees from the course named in the deed, would embrace the strip in controversy according to the evidence; and if the public road were straight and bore north 41 degrees east, the description in the deed would necessarily embrace the strip, since a line run north 41 degrees east a given distance would terminate farther north and therefore farther in the direction of the Hess land than one run the same distance north 54 degrees [533] east. But the evidence shows that the road is not straight, but makes

various curves, and no evidence was offered to show where a line 67 poles and 8 links in length following the road would terminate, whether east or west of the line up to which the parties have always occupied. There is, therefore, a want of evidence showing title in plaintiff to any land east of the line upon which the parties built their fence, which is the line designated in the defendant's pleas.

It is unnecessary, in view of what has been said, to discuss the numerous charges given at the request of the plaintiff, since they relate either to the questions of the adverse character of the defendant's possession, or to the question of plaintiff's title under her deed to the strip in controversy.

The plat or survey made by the county surveyor, Wood, if offered as an official survey under section 939 of the code of 1886 (Code 1896, sec. 3895), was inadmissible because it was not a plat or survey of the land described in the deed or in the complaint, and was not presumptive evidence against the defendant. It does not, however, appear that it was offered under the provisions of said section as an official plat, and if not, it was competent in connection with the surveyor's testimony, but its effect as evidence should have been limited to the purpose for which it alone was admissible: Vandiver v. Vandiver, 115 Ala. 328; Bridges v. McClendon, 56 Ala. 327.

The judgment of the circuit court is reversed and the cause remanded.

ADVERSE POSSESSION—HOLDING BY MISTAKE—IMPORTANCE OF INTENTION.—In cases of mistake as to the true boundary line between adjoining lands, the real test as to whether or not a title is acquired by a holding for the period of the statute of limitations is the intention of the party holding beyond the true line. If such occupation is by mere mistake, with no intention on the part of the occupant to claim, as his own, land which does not belong to him, but he intends to hold only to the true line, wherever it may be, the holding is not adverse. If, however, the occupant takes possession, believing the land to be his up to the mistaken line, and, claiming title to it, so holds, the holding is adverse. The intent to claim title up to the line is an indispensable element of adverse holding; the claim of right must be as broad as the possession. Simple acquiescence, or lying by without objection, for the statutory period, in case of such adverse holding, binds the party so lying by to the line, though not the true line: Watrous v. Morrison, 33 Fla. 261; 39 Am. St. Rep. 139, and note. See extended note to Finch v. Ullman, 24 Am. St. Rep. 388-390; Wilson v. Hunter, 59 Ark. 626; 43 Am. St. Rep. 63.

BOUNDARIES.—The settled rule in the description of boundaries to land is, that monuments, whether natural objects or artificial marks, are allowed to dominate courses and distances given in deeds: Crampton v. Prince, 83 Ala. 246; 3 Am. St. Rep. 718; Johnson v. Archibald, 78 Tex. 96; 22 Am. St. Rep. 27, and monographic note.

FIELDS *v.* CLAYTON.

[117 ALABAMA, 538.]

RESCISSION OF A CONTRACT TO PURCHASE LAND—COVENANTS OF WARRANTY.—If a purchaser of real property receiving a conveyance with covenants of warranty enters into possession thereof, and neither fraud nor insolvency is imputable to his grantor, a court of equity will not decree a rescission of the contract for failure of title, because the purchaser is protected by his covenants.

A MORTGAGE PASSES THE TITLE, and the mortgagee may take immediate possession, unless it appears by express stipulation or necessary implication that the mortgagor is entitled to remain in possession until default. After the law day, the legal estate is absolute in the mortgagee, and the mortgagor has nothing left but an equity of redemption.

MORTGAGE.—THE GRANTEE OF A MORTGAGEE, after condition broken, taking possession of property, stands in the same relation to it as the grantor would have stood had he not conveyed. He holds possession before foreclosure as trustee of the mortgagor, and is bound to preserve the premises from waste and to apply the rents and profits to the payment of the mortgage debt.

CONVEYANCE.—THE REFUSAL OF A GRANTOR TO CORRECT A MISTAKE in a description of property conveyed by him with covenants of warranty and of which his grantee has taken and holds possession, while it may amount to a breach of such covenant, does not entitle the grantee to a rescission. His remedy is by an action on his covenants or a suit to reform the conveyance.

RESCISSION.—THE GRANTOR OF LAND DOES NOT ASSENT TO A RESCISSION, where he takes a mortgage from the grantee to secure the payment of the purchase price, by conveying the same realty to a third person subject to the equity of redemption of the first grantee and mortgagor.

Emery C. Hall, for the appellants.

Inzer & Ward, contra.

539 BRICKELL, C. J. The bill was filed by the appellee, and the material allegations are, that on the seventeenth day of November, 1894, he purchased of the appellant a described parcel of land, at and for the price of two hundred and fifty dollars, payable in four installments of sixty-two and fifty one-hundredths dollars each, for which he gave several promissory notes maturing at different times. The appellant executed a conveyance to the appellee, having 540 and containing covenants of warranty, and the appellee contemporaneously executed a mortgage to secure the payment of said promissory notes as they severally and respectively became due and payable. The appellee under the conveyance entered into possession and made valuable improvements, continuing in possession until some time in October, 1896. The parcel of land was incorrectly de-

scribed in the conveyance and in the mortgage, and while in possession, the appellee often requested the appellant to make a conveyance of said land by a proper description, with which request he failed and refused to comply. That the appellee offered to surrender the land to the appellant, if he would surrender the notes and mortgage. On the 16th of November, 1896, the appellant sold and conveyed the land (excepting a small part thereof) to one Mann, to whom the appellee surrendered possession, and who was in possession at the filing of the bill, the conveyance reciting, "This land is subject to redemption by A. J. Clayton." The appellant purchased the land of one Mary A. Tidmore, and, at the time of the sale and conveyance to the appellee, he had not obtained a conveyance from her. On the 6th of December, 1895, the appellant accepted a conveyance from said Mary A. which did not include the small part excepted from the conveyance to Mann, and, some time in 1895, she made a conveyance thereof to a person whose name is not stated, and who is averred to have been in the actual possession at the filing of the bill. The appellant had obtained judgments on two of the promissory notes falling due before the filing of the bill. The prayer is for a rescission of the contract of purchase, an account of the value of the improvements made on the land, and of the rents while appellee was in possession, the cancellation of the mortgage and the outstanding notes given for the purchase money, the vacation of the judgments obtained on two of the notes, and for general relief. The appellant moved a dismissal of the bill for want of equity, and demurred, assigning several causes. The motion and demurrer were overruled, and from the decree overruling them the appeal is taken.

The principle governing a court of equity in decreeing rescission of contracts relating to the sale and conveyance of land, are well defined and settled. If, as in this case, the purchaser enters into possession, under a contract [541] executed by a conveyance with covenants of warranty, though the vendor may not have title, if fraud be not imputable to him, and he is not insolvent, or there is not some other independent equity, the purchaser is protected by the covenants of warranty, and the court will not intervene and decree a rescission of the contract of purchase: Burkett v. Munford, 70 Ala. 423; Meeks v. Garner, 93 Ala. 17; Parker v. Parker, 93 Ala. 80, and authorities cited.

Construing the allegations of the bill most favorably for the pleader (as they must be construed in the determination of a

motion to dismiss for want of equity), there was no fraud, or misrepresentation, in whatever of negotiation may have preceded, or was coincident with the execution of the conveyance. Nor can the bill be taken as averring a want of title in the vendor. All that is averred is imperfection, error, or mistake in the description of the land as conveyed, the like imperfection or error existing in the conveyance through which the vendor deducted title. Such imperfections are not of infrequent occurrence in the conveyances of land—they do not impair or destroy title. They affect the conveyance, and may render it imperfect, inconclusive as a muniment or evidence of title, upon which legal remedies for the recovery of possession may be supported: 2 Devlin on Deeds, sec. 1010. A court of equity, at the instance of a proper party, will intervene and reform the conveyance, making it evidence of the title by a correct description of the land, if the parties will not voluntarily cure the imperfection. It was the duty of the appellant, on the request of the appellee, to have cured the imperfect description of the land. The imperfection embarrassed alienation, and was calculated to produce in the mind of the appellee a sense of uneasiness and insecurity. The neglect of the appellant was a breach of the covenants of warranty, entitling the appellee to resort to a court of equity for a reformation of the conveyance; and whatever of reasonable expenses he may have incurred in perfecting the title would have been recoverable of the appellant, upon the same principle, that a grantor is bound to reimburse the grantee for removing a paramount title or encumbrance: 3 Sedgwick on Damages, 8th ed., sec. 979. Protected by the covenants of warranty, the appellee has no equity to insist that the delinquency [542] of the appellant is cause of rescission; a mere breach of the covenants of warranty is not cause of rescission.

The theory of a mortgage prevailing in this state is, that as between mortgagor and mortgagee, it passes to the mortgagee the estate in the land. It is more than a mere security for a debt; it passes the title, under which the mortgagee may take immediate possession, unless it appears by express stipulation, or necessary implication, that the mortgagor may remain in possession until default. After the law day, the legal estate is absolutely vested in the mortgagee, and the mortgagor has nothing left but an equity of redemption. A conveyance by the mortgagee will pass the legal title, though the debt be not assigned. But as against all the world, except the mortgagee and his assigns, the mortgagor is regarded as the owner, entitled to

the possession: 2 Jones on Mortgages, sec. 18; Paulling v. Barron, 32 Ala. 9; Barker v. Bell, 37 Ala. 354; Knox v. Easton, 38 Ala. 345; Welsh v. Phillips, 54 Ala. 309; 25 Am. Rep. 679; Toomer v. Randolph, 60 Ala. 357. At the time of the conveyance to Mann, the condition of the mortgage had been broken; it was broken by the default of the appellee in paying either of the promissory notes, payment of which the mortgage was intended to secure, two of which were past due, and had been reduced to judgments at law. It is, perhaps, a necessary implication that it was contemplated the mortgagor should remain in undisturbed possession until there was default in the payment of the notes as they severally matured. But the default had occurred, the right of the mortgagee had accrued, and, without affecting the equity of redemption, all that remained to the mortgagor, the mortgagee could rightfully sell and convey the legal estate, passing his right of entry: Welsh v. Phillips, 54 Ala. 309; 25 Am. Rep. 679; 2 Washburn on Real Property, c. 16, sec. 4; 2 Jones on Mortgages, sec. 808. The conveyance to Mann recites on its face: "This land is subject to redemption by A. J. Clayton." And if it had not, as against the appellee, it would have passed only the legal estate, not embarrassing the equity of redemption. The grantee, entering into possession under it, stands in the relation in which the grantor would have stood, if he had entered—a mortgagee in possession before foreclosure, holding possession as a trustee for the mortgagor, bound to preserve the premises from waste, [543] and to apply the rents and profits to the payment of the mortgage debt. The conveyance was not intended, and cannot operate, as a rescission of the contract of purchase—it was not in hostility to the equity of redemption, but in recognition of it. Nor can it be regarded as an election to accept the proposition of the appellee, to surrender possession and rescind upon the delivery and cancellation of the mortgage and notes. Acceptance of that proposition is negatived by the recital of the conveyance that the land was subject to redemption by the appellee—it would not have been subject to redemption if there had been acceptance of the proposition.

In any view of the bill, construing the allegations most favorably to the appellee, we cannot declare that it presents a case of equitable cognizance, and are constrained to the conclusion that the motion to dismiss should have been sustained.

The decree of the chancellor must be reversed, and a decree rendered dismissing the bill for want of equity.

VENDOR AND PURCHASER—RESCISSION—REMEDY ON COVENANTS.—A grantee of land conveyed with warranty has a remedy upon the covenants of his deed for failure of title, and, if a perfect title is tendered by the grantor before a decree is rendered, the contract will not be rescinded unless it appears to the court that the grantee has sustained some loss, injury, or damage, by reason of the delay in perfecting the title: Bradtfeldt v. Cook, 27 Or. 194; 50 Am. St. Rep. 701. Compare Parham v. Randolph, 4 How. 435; 35 Am. Dec. 403.

MORTGAGE—TRANSFER OF TITLE.—Between the parties, a mortgage transfers the legal title, defeasible on performance of the conditions, and the right of immediate possession, unless by its terms possession is reserved in the mortgagor for an unexpired term. As to the mortgagee, the mortgagor has only an equity, but as to all persons except the mortgagee and those claiming in his right the mortgagor is the owner of the fee and has title under which he may maintain ejectment against strangers who have no connection with the title of the mortgagee, and the defendant in ejectment will not be allowed to set up such outstanding title to defeat the action: Cotton v. Carlisle, 85 Ala. 175; 7 Am. St. Rep. 29, and extended note. As to the nature of a mortgage contract, see Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Blunt v. Walker, 11 Wis. 334; 78 Am. Dec. 709; Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765, and notes. At common law, a mortgage transferred the legal title to the mortgagee: Smith v. Kelley, 27 Me. 237; 46 Am. Dec. 595; Drayton v. Marshall, Rice Eq. 373; 33 Am. Dec. 84; while under the modern equity rule a mortgage is regarded merely as a security, and the mortgagee has but a chattel interest: Freeman v. Bass, 34 Ga. 355; 89 Am. Dec. 255; Hall v. Savill, 3 G. Greene, 37; 54 Am. Dec. 485; Runyan v. Mersereau, 11 Johns. 534; 6 Am. Dec. 393.

BABCOCK *v.* CARTER.

[117 ALABAMA, 575.]

SUNDAY.—AN APPEAL BOND SIGNED ON Sunday, but delivered on a week-day to the clerk of the court, to whom it was made payable and by whom it was approved and accepted, created no liability until it was delivered, and therefore is not void as being executed on Sunday.

APPEAL BOND—IRREGULARITIES IN DO NOT MAKE VOID.—The fact that an undertaking on appeal was made payable to the clerk of the court instead of to the plaintiff in the judgment does not make it void. The sureties are, therefore, liable thereon.

A JUDGMENT AGAINST ONE SURETY IS ADMISSIBLE in an action by him against his cosurety for contribution for the purpose of proving its rendition and by way of inducement as evidence that the liability on which it was founded had been paid by the plaintiff.

PRACTICE.—PARTIES IN CHANCERY MUST REDUCE TO WRITING OBJECTIONS to the admissibility of evidence incorporating them in the note of submission or otherwise call them directly to the attention of the chancellor. Otherwise, such objections are deemed to have been waived.

PAROL EVIDENCE—SURETIES IN SUIT BY FOR CONTRIBUTION.—The fact that a judgment against a surety on an

approval bond was recovered in the name of the plaintiff in such judgment, when it should have been in the name of the clerk of the court for the use of such plaintiff, does not constitute any defense in an action by such surety against his cosurety for contribution.

Parks & Harmon, for the appellant.

Gamble & Bricken and D. M. Powell, contra.

577 BRICKELL, C. J. The original bill, in which the appellant was complainant, was filed to compel the defendants, 578 the appellees, his cosureties, to contribute to his reimbursement moneys he had paid in satisfaction of the common obligation or liability. By way of plea, incorporated in the answer, the defendants alleged in defense that the bond, constituting the common liability, was executed by them on Sunday. Much of the evidence introduced by the defendants was in proof of the fact that the bond was signed by them on Sunday, and the record is not without indications that the stress of controversy in the court below was whether the fact of the signing on Sunday did not render the bond invalid as to the defendants. However that may be, the uncontradicted evidence is, that the bond was delivered on a week day to the clerk of the court, to whom it was payable, and by whom it was approved, and by the approval accepted. Until the delivery, the bond did not pass from the dominion of the signers—it was of no force, creating no liability; there remained to each of the signers the locus penitentiae, and he could have intercepted the delivery, preventing it from becoming a contract or obligation. To have rendered it subject to the interdiction of the statute, it must not only have been signed but delivered on Sunday: Flanagan v. Meyer, 41 Ala. 132; Lovejoy v. Whipple, 18 Vt. 379; 46 Am. Dec. 157.

The bond should have been made payable to Bolling, the plaintiff in the judgment, execution of which was superseded, and not to Worthy, the clerk of the circuit court—this is the requirement of the statute: Code 1886, sec. 3624; Code 1896, sec. 441. This departure from the statute does not render the bond void. The principle is familiar, and has been of frequent application to bonds taken by ministerial officers in the course of judicial proceedings, and intended to be taken in compliance with statutory requirements, though departing from them, may be valid as common-law obligations; and will be, if voluntary, founded on a valuable consideration, and not in condition violative of law: 1 Brickell's Digest, sec. 46, p. 309; 3 Brickell's Digest, sec. 1, et seq., p. 98. The action on the bond, in which

the judgment against the appellant was recovered, ought to have been instituted and prosecuted, not in the name of Bolling only, but in the name of Worthy for the use of Bolling. The bond was payable to Worthy, and, not being a contract
579 for the payment of money only, was not within the influence of the statute (Code 1886, sec. 2594; Code 1896, sec. 28), requiring suits to be prosecuted in the name of the party really interested, whether he has the legal title or not. This was a mere informality, capable of being cured by an amendment of the complaint, if objected to, at any time before judgment: Dwyer v. Kennemore, 31 Ala. 404; Harris v. Plant, 31 Ala. 639; Johnson v. Martin, 54 Ala. 271; American Union Tel. Co. v. Daughtery, 89 Ala. 191. If the amendment had been made, Bolling would have been considered the only party on the record (Code 1886, sec. 2595; Code 1896, sec. 29), and he alone could have received satisfaction of the judgment. A demurrer because of the informality the appellant could have interposed, but in no event would it have been availing for any other purpose than mere delay; and the result would have been that a judgment having the same legal operation and effect of that which was rendered would have been rendered.

The graver question is, whether it is shown that the common liability had accrued, becoming an existing cause of action, before the appellant made the payment to Bolling. The liability was contingent; it could not ripen into an absolute liability until there was a breach of the condition—the failure of the principal Giddens to prosecute to effect the appeal he had taken to this court. The purpose of the appeal was the reversal of the judgment rendered by the circuit court, and the reversal was the effect to which the principal was bound to prosecute the appeal; otherwise, the condition of the bond was broken, and the liability of the parties upon it was freed from all contingency. It is rather suggested than insisted in the argument of counsel that the bill avers that the appeal was prosecuted to effect. The averment, if it is not, as it appears in the record before us, a mere clerical error in transcribing, is rather loose and uncertain, but, taken as a whole, it cannot be fairly interpreted as averring that the appeal was prosecuted to effect; for the controlling part of it is the clear, unequivocal statement of the affirmance in this court of the judgment from which the appeal was taken.

The unverified answer of the defendants, by a mere disclaimer of all knowledge or information of the alleged affirm-

ance of the judgment of the circuit court, puts in [580] issue the breach of the condition of the bond, casting the burden of proving it on the appellant. We were inclined to the opinion that the fact was not shown by the evidence found in the record. A more thorough examination leads us to a different conclusion.

The hearing was on the pleadings, exhibits, and testimony, as noted by the register. The complainant offered in evidence the deposition of himself and of O. Worthy, and the exhibits attached, and the depositions of R. O. Lawrence and J. C. Giddens. The defendants offered in evidence the depositions of S. D. May, A. L. Carter, H. S. Carter, and J. A. Giddens. The original bill had annexed as exhibits a copy of the bond and a copy of the judgment rendered thereon against the appellant. The deposition of the complainant stated fully the bringing of the suit against him alone, the rendition of the judgment, annexing as an exhibit a certified copy of it, the satisfaction of the judgment, and annexes a copy of the receipt taken from the attorney of the plaintiff. There is no necessity for a reference to the other evidence, for it is not in disputation of the fact of the suit, nor of the rendition of the judgment against the complainant, nor of its satisfaction.

The judgment against the complainant was clearly admissible to prove the fact of its rendition, and by way of inducement to the evidence that the liability on which it was founded, and for which the defendants were bound as cosureties with the complainant, had been paid by the latter: Preslar v. Stallworth, 37 Ala. 402. Whether it was evidence, prima facie, or conclusive, of the existence of the common liability—that there had been a breach of the condition of the bond—it is not now necessary to consider. It was offered and received in evidence, not only to prove the fact of its rendition, and not only by way of inducement to the evidence of its satisfaction, but as evidence of every material fact involved in its rendition. There was no objection to its introduction; no request that it should in any wise be limited to any particular purposes. Nor is it now insisted that the judgment is not evidence of the existence of the common liability. The insistence is, that Bolling was without right to sue on the bond, and, if the appellant had properly defended, he could have defeated the suit—an insistence we have already considered. Parties in chancery [581] must reduce to writing objections to the admissibility of evidence, incorporating them in the note of submission, or otherwise calling them

directly to the attention of the chancellor, or the presumption arises that all such objections are waived: Seals v. Robinson, 75 Ala. 363; Binford v. Dement, 72 Ala. 491.

We conclude that no one of the matters of defense preferred by the answer is availing, and that the evidence entitled the complainant to relief.

The decree must be reversed, and the cause remanded, for further proceedings in conformity to this opinion.

SURETYSHIP — CONTRIBUTION BETWEEN COSURETIES — JUDGMENT AS EVIDENCE.—As a general rule, where it is established that two or more persons are cosureties, and one of them pays the debt for which they are liable, he may have contribution from the others to the extent they are thereby relieved. If a judgment has been rendered against him, he may pay and demand contribution without waiting for execution to be taken out: See monographic note to Gross v. Davis, 10 Am. St. Rep. 640. It is immaterial that the other cosurety's name was stricken out by the plaintiff in the suit on the bond to which the cosureties had signed their names: Dole v. Warren, 32 Me. 94; 52 Am. Dec. 640; and that the other cosurety was not served with process: Van Winkle v. Johnson, 11 Or. 469; 50 Am. Rep. 495. The record of a recovery against sureties on a bond is competent evidence against cosureties, in a writ for contribution, of the amount of recovery: Fletcher v. Jackson, 23 Vt. 581; 56 Am. Dec. 98, and note.

Liability of Sureties on Defective Bonds or Undertakings on Appeal.

When an appeal is taken or a writ of error prosecuted, the statutes usually provide that a bond or undertaking shall be given conditioned to the effect that the appellant or plaintiff in error will prosecute his appeal or writ of error, and that, if the judgment or decree appealed from is affirmed, he will pay the costs of appeal and the damages that may be awarded if the appeal be adjudged frivolous, not exceeding the amount specified in the bond or undertaking. If the appellant or the plaintiff in error desires to stay the execution of the judgment or decree appealed from, he is commonly entitled to give a bond or undertaking in a sum fixed either by the court or by statute, and the condition of the bond or undertaking is, in substance, that if the judgment or decree is affirmed, that the appellant or plaintiff in error will pay such judgment or decree. If the relief awarded by the judgment or decree is not for the payment of money, but is for the possession of property, the bond is generally conditioned for the delivery of the property, if the judgment or decree should be affirmed, and also for the payment of the damages for its detention during the period intervening between the giving of the bond and final compliance with, or satisfaction of, the judgment or decree.

The statutes of the several states usually provide for the time of filing the bond or undertaking, the number and qualification of the sureties, and for affidavits to be made by them disclosing their eligibility to become such sureties. It often happens that the bond or

undertaking is imperfect in form in not containing the precise conditions prescribed by statute, or in not being in the amount necessary to support the appeal, writ of error, or to stay the proceedings, or that the sureties do not show themselves to possess the qualifications required by statute. Whether the defect is of the character already supposed or is in respect to some other matter, it may happen, after the judgment or decree has been affirmed, and when liability of the sureties is sought to be enforced, that they urge, as a defense to any action or proceeding against them, the insufficiency or irregularity of the bond or undertaking to which they were parties.

So far as the appellee or respondent is concerned, there is no doubt that he is entitled to a bond or undertaking in substantial conformity to the statute, and that for any omission or irregularity in the bond he may, by proper objection or proceeding, prevent the bond from being employed against him, either in support of the appeal or writ of error, or for the purpose of obtaining a stay of the proceedings from the judgment or decree sought to be reviewed. With respect to the appeal or writ of error itself, there can be no doubt that, as against the objection of the respondent or appellee, it is not sufficient to show that a good common-law obligation has been entered into which may be enforced against the sureties, for he is entitled to security in every respect in substantial conformity to the statute, and, in the absence of such conformity, may move to dismiss the appeal or writ of error, and his motion will be granted: Jordan v. McKenney, 45 Me. 306; Bartlett, Petitioner, 82 Me. 210; Putnam v. Boyer, 140 Mass. 235; Alberson v. Mahaffy, 6 Or. 412; James v. Roberts, 78 Tex. 670; Cummings v. State, 31 Tex. Crim. Rep. 406; Maxwell v. State, 38 Tex. 172; Brown v. State, 34 Tex. 526; Stroud v. State, 33 Tex. 650; Bennett v. State, 30 Tex. 447. If, however, there is a substantial compliance with the statute, mere technical errors and immaterial variances will be disregarded, even when made the basis of a motion to dismiss the appeal or writ of error: Corey v. Lugar, 62 Ind. 60; McCrory v. Anderson, 103 Ind. 12; Asch v. Wiley, 16 Neb. 41; Holly v. Perry, 94 N. C. 30; Acker v. A. & F. Ry. Co., 84 Va. 648.

Where no motion has been made to dismiss the appeal or writ of error, and the judgment or decree has been affirmed by the appellate court, such affirmance establishes, against the sureties, that the court had jurisdiction of the appeal, and hence necessarily affirms the liability of the sureties in so far as their undertaking has stipulated for the payment to the respondent or appellee of the costs of the appeal or of such damages as may have been awarded to him on the ground that the appeal was frivolous. The sureties are estopped from alleging either that the case was one in which no appeal could be taken (Gudtner v. Kilpatrick, 14 Neb. 347), or that it was not taken or the bond given within the time allowed by statute, and hence that the appellate court did not acquire jurisdiction: Adams v. Thomson, 18 Neb. 541.

If the bond or undertaking in question was given for the purpose of staying execution, but it, in some substantial respect, does not conform to the statute, it does not impose upon the respondent or appellee the duty of submitting to such stay, but if he, in any way, elects to take advantage of the irregularity or omission, he is doubtless bound thereby and cannot subsequently change his intention and elect to hold the sureties answerable on the imperfect or insufficient bond. If he takes out execution and proceeds to collect his judgment or some part thereof, he cannot subsequently enforce the liability against the sureties: Hemingway v. Poucher, 98 N. Y. 281. If he calls on the sureties to justify and they fail to do so, and the statute provides that such failure has the same effect as if the undertaking had not been given, they are released from liability: Manning v. Gould, 99 N. Y. 476.

The respondent or appellee may, however, expressly or impliedly waive any defect in the bond or undertaking, and this waiver is presumed from his remaining inactive and not taking any measures for the enforcement of his judgment: Thompson v. Lea, 28 Ala. 453; and whenever he has expressly or impliedly waived compliance with any provision of the statute intended for his protection, his waiver is irrevocable, and he cannot subsequently escape from it by motion to dismiss the appeal or otherwise: Ives v. Finch, 22 Conn. 101.

A bond apparently given for the purpose of supporting an appeal or writ of error or of obtaining a stay of execution, during the prosecution of either, however much it may depart from the mandate of the statute or may fail to give the respondent or appellee the security contemplated by the statute, is, nevertheless, where he accepts it, a good common-law obligation and enforceable against the sureties according to its terms: Nunn v. Goodlet, 10 Ark. 89; Dore v. Covey, 13 Cal. 502; Mix v. People, 86 Ill. 329; Meserve v. Clark, 115 Ill. 580; Field v. Schricher, 14 Iowa, 119; Pray v. Wasdell, 146 Mass. 324; Healy v. Newton, 96 Mich. 228. The sureties, on their part, cannot escape liability by urging formal defects in the bond or undertaking which the respondent or appellee has apparently waived: Jones v. Droneberger, 23 Ind. 74.

Where the bond or undertaking was for the stay of execution, but was not sufficient to have accomplished that purpose had the respondent or appellee objected thereto or taken out execution and proceeded to the enforcement of his judgment, but he has, nevertheless, made no objection nor taken any proceedings for such enforcement, it has not been unusual for the sureties to seek to escape liability on the ground that there was no consideration for their bond or undertaking, because it did not impose on the respondent or appellee any duty not to proceed to the enforcement of his judgment, and hence has not been of any prejudice to him. So far as we have been able to discover, the courts have unhesitatingly, and with entire unanimity, overruled defenses of this character, and have regarded the fact that no proceedings were taken to enforce the judgment as sufficient evidence that the bond had accomplished

the object for which it was given, namely, to procure a stay of the execution, and such being the case, that it is supported by a sufficient consideration and enforceable against the sureties as a common-law obligation: Railsback v. Greve, 58 Ind. 72; Minor v. Rodgers, 65 Mich. 225; Granger v. Parker, 142 Mass. 186; Adams v. Thomson, 18 Neb. 541.

Independently of any statute upon the subject, the sureties on an appeal bond, if the appellant or plaintiff in error had the benefit thereof and of the stay contemplated thereby, are estopped from urging any irregularity or insufficiency therein; and if the undertaking is not good as a statutory undertaking, it is always held valid and enforceable against the sureties as a common-law obligation. As to sureties on an official bond, they are bound, whether it conforms to the statute or not: Tevis v. Randall, 6 Cal. 633, 65 Am. Dec. 547, where the bond was joint, instead of joint and several; Baker v. Bartol, 7 Cal. 551, where the court had no power to exact the bond, but the defendant received benefit from it; Gardner v. Donnelly, 86 Cal. 367, where the conditions of an undertaking to release an attachment were more onerous than the law required; Stephens v. Crawford, 1 Ga. 574; 44 Am. Dec. 680; Kincannon v. Carroll, 9 Yerg. 11; 30 Am. Dec. 391; Claasen v. Shaw, 5 Watts, 468; 30 Am. Dec. 338. This rule has frequently been applied to undertakings on appeal; and the rule asserted that failure to conform to conditions intended for the benefit of the respondent does not release the sureties: Dore v. Covey, 13 Cal. 502, where it was urged that the undertaking did not, as required by statute, show the residence or occupation of the parties, and was not in double the amount of the judgment. This case shows that the appellant is the only person that can raise objections to the undertaking: Hathaway v. Davis, 33 Cal. 169, where it was held that the fact that the appeal was not taken in time could not be urged if the judgment was affirmed; Murdock v. Brooks, 38 Cal. 596-601, where sureties claimed release because they did not justify so as to stay execution; Van Deusen v. Hayward, 17 Wend. 67; Goodwin v. Bunzl, 102 N. Y. 224, where from a judgment in replevin the undertaking was in the form for an appeal from a money judgment, and the court held that the mere forbearance of respondent entitled him to prosecute his action against the sureties; Granger v. Parker, 142 Mass. 186, where it was insisted that the security on appeal should have been by recognizance instead of by bond; Pray v. Wasdell, 146 Mass. 324, where the condition of the bond was not that required by statute; Meserve v. Clark, 115 Ill. 580, where both defendants were required to give a bond, and only one gave it: George v. Bischoff, 68 Ill. 236.

It is doubtless true that a respondent or appellee who has not waived the right to object to a bond upon a writ of error or appeal may insist that it does not comply with the statute and that the appeal be dismissed, or that a stay of execution be not granted, where the appellant has not given the bond necessary

to support such appeal or such stay. Where, however, the respondent or appellee has either expressly or impliedly accepted or acted upon the bond given, it will be regarded as a good and sufficient common-law bond, whether it conforms to the statute or not. The cases which we have cited abundantly establish this. To make their pertinency more clear we shall, however, take the liberty of making some quotations from some of them. Thus, the case of Van Deusen v. Hayward, 17 Wend. 67, was an action against the sureties upon an appeal bond, and the trial court held that they were not liable, because the bond was not conformable to the statute, in this, that its condition was that the appellant should, if judgment were rendered against him, pay the judgment and costs, or surrender his body in execution. It was said that the respondent should have quashed the appeal, or, at least, have taken out an execution notwithstanding the giving of the bond. The supreme court, after referring to certain decisions relied upon by the sureties, said: "Within the principle of these decisions the appeal of Hayward might have been quashed on motion, because the bond was less beneficial to the plaintiffs than the statute required. But the plaintiffs made no objection to the sufficiency of the bond. Hayward has had the full benefit of his appeal, and I think the defendants should not now be allowed to object that their own voluntary obligation was less onerous than it should have been. I will not say that this opinion can be reconciled with all the decisions that have been made in relation to appeal bonds, nor that all the cases on that subject are entirely consistent with each other; but, upon general principle, I think the defendants should not be heard to make that objection." In a much later case in the same state, that of Goodwin v. Bunzl, 102 N. Y. 224, which was also an action upon an appeal bond, the sureties sought to escape liability on the ground that the judgment appealed from was a judgment in replevin for the possession of personal property, while the undertaking on appeal, instead of being in the form appropriate to stay an execution upon that class of judgments, was in the form prescribed for the appeal from a mere moneyed judgment. The sureties insisted that, as the undertaking which was in fact given by them did not entitle the appellant to a stay of execution, that there was no consideration for their obligation, no detriment to the respondent, and therefore no right of recovery in the present action. The court of appeals, in affirming a judgment against the sureties, said that the giving of the undertaking in the case was an idle ceremony unless intended to secure some object, that the attorneys on both sides had treated it as appropriate and effectual, and that no proceedings had been taken to enforce the judgment after the termination of the appeal. The court said: "The transaction was in legal effect a forbearance on the part of the plaintiffs, at the request of the defendants, to pursue their legal remedy against the defendants pending the appeal, in consideration of the undertaking. The undertaking was in the form prescribed by sec-

tion 1327 of the code for undertakings to stay execution on moneyed judgments. It was not in the form of the statutory undertakings to stay proceedings on an appeal from a judgment for the recovery of chattels. But the undertaking was not illegal; it was not taken colore officii, and it is founded on a good consideration. It should be held, we think, to inure as a good common-law agreement enforceable according to its terms. This conclusion accords with the sense of justice, and is not precluded by the authorities." In the case of Hill v. Burke, 62 N. Y. 111, sureties upon an appeal bond defended an action brought against them, on the ground that there was no proof of the service of the notice of appeal or of the filing of it with the clerk, or of a service of a copy of the undertaking on the plaintiff, as required by the code, and that the undertaking was of no effect because no affidavit was made by the sureties to the effect that they were worth double the amount specified in the undertaking, as required by statute, and that if the undertaking was effective, for any purpose, it was not operative to stay an execution, and that the parties were, therefore, liable only for the costs of an appeal. The court held, as to the first question, that the affirmance of the judgment by the court of appeals conclusively established the facts necessary to the perfecting of the appeal and the giving of the appellate court jurisdiction. As to the second proposition, the court held, notwithstanding the provision of the code declaring that an undertaking on appeal shall be of no effect unless accompanied by the affidavit of the sureties that they are worth double the amount named therein, "such undertaking is not necessarily a nullity in the sense that it is not obligatory simply because it was not accompanied with such an affidavit of justification of the sureties as the code prescribes. While, therefore, such an undertaking might not operate as a stay of proceedings, and the appeal might be dismissed for irregularity upon motion of the respondent, it does not relieve the sureties from the liability they have taken upon themselves. It still remains an obligation for them to perform if the judgment is affirmed. The object of the provision was, no doubt, to protect respondents against inefficient sureties upon an appeal, and the section also provides for an exception by him to the sufficiency of the sureties and their subsequent justification; but it was not intended, I think, that the sureties should escape because there was an informality in the justification or that it was not strictly in accordance with the code. So long as the undertaking was in due form, in accordance with the statute, and the appellant received a full consideration for the bond by a stay of proceedings on the judgment until the appeal was decided, there is no sufficient reason why the sureties should be exonerated." In employing this language, the court of appeals substantially adopted the conclusions of the superior court of the city of New York announced there forty years ago in the case of Gibbons v. Burhard, 3 Bos. 635, where the objection was in behalf of the sureties that it did not appear that

they had justified as required by statute, that the execution therefore was not stayed, and that there was no sufficient consideration for the undertaking on appeal. The California cases on this subject are quite as conclusive as those of New York. At a comparatively early day, the supreme court of California, in Dore v. Covey, 13 Cal. 502, quoted and adopted the opinion from 17 Wendell, which we have already cited, adding: "The respondent's argument that the undertaking shall not stay execution unless made in precise conformity with the statutory rules is answered by the authorities cited, which hold, in effect, that these provisions are intended for the benefit of the other party, and that he may waive them just as if the statute declared that no judgment should be rendered without service of process, but the defendant might waive the process or the service. This waiver was made by the plaintiff below. He considered the appeal as regularly made, made no motion to dismiss, issued no execution, and suffered the undertaking to have the full effect of a regularly executed instrument." In the case of Hathaway v. Davis, 33 Cal. 169, sureties on an appeal bond sought to escape liability on the ground that no appeal had in fact been taken. The court answered: "Nor is the point that the appeal from the judgment was not taken within the time, and that for that reason the undertaking of the sureties was without consideration, available to the defendants. Concede that the undertaking did not operate to legally stay proceedings upon the judgment (a point which we do not decide), yet it in fact had that effect, and that the appellants received all the benefit for which their sureties contracted, and were they allowed now to say that their undertaking was nudum pactum, gross injustice might be done to the plaintiff because he did not choose to act upon a doubtful right. Moreover, they cannot be allowed to question the validity of the judgment of affirmance on the score of jurisdiction, or upon any other ground—it is conclusive upon them upon all points upon which it acts." Murdock v. Brooks, 38 Cal. 596, is another of the many illustrations that sureties upon an appeal bond, after securing to the appellant the advantages of an appeal, will, upon the affirmance of the judgment, interpose objections to their acts and seek to escape liability upon the ground that the respondent might have objected to the undertaking had he chosen to do so. In this case, it was insisted that the sureties had not justified, and therefore that there was no stay of execution. Judge Sanderson, in his peculiarly clear and forcible language, said: "Whether the undertaking was accompanied by the affidavit of the sureties does not appear upon the face of the complaint, but it does appear from the facts there stated that further proceedings were never taken upon the judgment, and that Brooks had the full benefit of a stay pending his appeal. Such being the case, can he or his sureties be heard to say that the undertaking is void because all the forms of the statute, through their omission, were not complied with? It seems to be settled that the failure of the sureties to justify, if such

were the case, constitutes no defense. This rule is deduced from the proposition, which no one disputes, that a party may waive a compliance with statutory conditions which are merely directory and intended solely for his benefit. The provisions of the statute which require the residence and occupation of the sureties to be stated, the penalty of the undertaking to be double the amount of the judgment, and the affidavit of the sureties that they are worth the amount specified in the undertaking over and above all their just debts and liabilities, exclusive of property exempt from execution, are directory, and a compliance therewith may be waived by the respondent either expressly or impliedly by failing to take any advantage of their nonobservance and treating and accepting the undertaking as sufficient."

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

ROCKFORD WHOLESALE GROCERY COMPANY *v.* STANDARD GROCERY AND MEAT COMPANY.

[175 ILLINOIS, 89.]

CORPORATIONS—PREFERENCES.—An insolvent corporation can prefer its bona fide creditors the same as any individual, but it cannot prefer a creditor who is also a director.

CORPORATIONS — INSOLVENCY — PREFERENCE TO GUARANTEED CREDITOR.—The directors of an insolvent corporation have power to authorize a judgment note to be given by the corporation to take up a note guaranteed by its directors and given for money borrowed and used for corporation purposes during its solvency. Fraud cannot be predicated on such transaction, although the holder of the note is thereby given a preference over other corporate creditors.

A. D. Early, for the appellant.

Works & Hyer, for the appellee.

91 PHILLIPS, J. The question of law raised by this record arises from this state of facts: A corporation, while solvent and a going concern, borrowed money of a bank, which indebtedness was guaranteed by the directors. Thereafter it became indebted to the appellant. By authority of the directors a judgment note was afterward given the bank in lieu of the original note, on which judgment was at once taken and the corporation property sold. Appellant recovered judgment thereafter, and, on return of execution nulla bona, filed a bill against said directors seeking to hold them personally liable for a breach of trust, setting up the foregoing facts, and alleging fraud in giving 92 said judgment note while said corporation was known to them

to be insolvent, for the purpose of the sale of said property under legal process. A demurrer thereto was sustained, and a decree entered dismissing the bill, which was affirmed by the appellate court on the authority of Blair v. Illinois Steel Co., 159 Ill. 350.

The corporation being insolvent and the directors being guarantors of said debt, were they at such time legally authorized to give such preference? The principle is firmly established, that in the absence of statutory prohibition an insolvent corporation can prefer its creditors the same as any individual, which preference, of course, is given by the action of the officers of the corporation: Burch v. West, 134 Ill. 258; Gottlieb v. Miller, 154 Ill. 44. The law is, however, that an insolvent corporation cannot prefer a creditor who at the time is a director therein: Beach v. Miller, 130 Ill. 162. Is the creditor deprived of the legal right to this preference by reason of the fact that such debt of the corporation is guaranteed by one or all of the directors?—for if the directors, in such case, have no legal right to give, the creditor has no legal right to receive, such preference. One proposition is necessarily the corollary of the other, for the element of fraud is involved in such preference, if illegal.

Mere insolvency does not dissolve the corporation or ordinarily abridge the statutory or common-law power of the directors. It does, however, prohibit them from giving a creditor director a preference. In such case, he, as an individual, alone received the benefit. The law will not allow him, in such case, to take advantage of his official position, as it would not be equitable to the other creditors. That equitable principle should not apply to a bona fide creditor where a debt is created and guaranteed by the director during solvency. Such guaranty, at least at such time, does not render such debt fraudulent. No law has been violated, and no reason exists why such a debt should be tainted with even the suspicion of illegality. 93 His relation as a creditor is created by his contract with the corporation, and not with the guarantors. He is just as clearly, by law, a creditor with such guaranty as without it. His rights as such creditor remain, to the end, unimpaired, during solvency and through insolvency.

The relation which the directors occupy is primarily that of trustees of the stockholders: Cook on Stock and Stockholders, sec. 648. So long as the corporation is doing business there is no priority between the directors or other officers and its creditors. It is a mere equitable principle that directors shall not

prefer themselves as creditors: Clark on Corporations, 608. When the corporation becomes insolvent, then, it is said, in equity the officials become trustees for the creditors; but the rule of law is fixed that after insolvency the authority to give a preference, in the absence of statutory prohibition, is as complete and absolute as that of an individual, for, as stated in Fogg v. Blair, 133 U. S. 534, "the doctrine that the property of the corporation is a trust fund only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders," and before any of it can be distributed to the directors, as creditors, by way of preference. This court has not enlarged upon this rule, in the way of enforcing such trust in favor of creditors, by holding, as some courts have, that a relative of a corporate official who is a creditor, or a creditor who has the guaranty of the directors, cannot secure such preference: Blair v. Illinois Steel Co., 159 Ill. 350. In fact, many courts hold that where directors are guarantors or creditors in good faith, they, as creditors, are entitled to a preference: See Gould v. Little Rock R. R. Co., 52 Fed. Rep. 680, for a review of authorities.

The directors were not the creditors of the corporation and were not primarily standing in that relation to it. The creditor loaned this money to the corporation in good [94] faith, while solvent and a going concern, and the money so obtained was used for its benefit. On no principle of law or reason can such creditor be deprived of its right to a preference merely because the directors guaranteed the debt. The act of obtaining such guaranty on the part of the creditor, or of giving it on the part of the directors, was neither illegal nor improper. It is not uncommon for the directors to be compelled to lend their personal credit, by way of surety or guaranty, in order to secure means to carry on the business. If this is done during solvency, for the benefit of the corporation, neither the right of such creditor so loaning on such guaranty, nor the power of the directors, is in any way affected or abridged as to a preference of such a debt.

It necessarily follows that fraud could not be predicated on the act of the directors in giving this judgment note to the bank, which resulted in a preference to it, as a creditor, in the distribution of the assets of said corporation. The demurrer was therefore properly sustained, and it was not error in the appellate court to affirm the decree.

The judgment is affirmed.

CORPORATIONS—INSOLVENCY—PREFERENCE OF CREDITORS.—The mere insolvency of a corporation does not of itself transform its assets into a trust fund for the equal benefit of all his creditors. Where a corporation, though insolvent, has control and possession of its property, it may, in the absence of fraud or statutory restriction, prefer a bona fide creditor by a deed of trust on its property, or by a mortgage, sale, assignment, or otherwise: Note to Cook v. Moody, 63 Am. St. Rep. 875. See Fowler v. Bell, 90 Tex. 150; 59 Am. St. Rep. 788, and note. Directors and officers of insolvent corporations cannot deal with them in such a manner as to secure preferences for themselves over other creditors: See monographic note to Buck v. Ross, 57 Am. St. Rep. 78, exhaustively discussing this topic.

SWAN *v.* GILBERT.

[175 ILLINOIS, 204.]

PARTNERSHIP—SALE OF PARTNER'S INTEREST UNDER EXECUTION.—A partner's interest in firm property may be sold under an execution against him individually, but the purchaser acquires such interest subject to the rights of partnership creditors and the other partners, and he may be compelled to settle with the other partners precisely as would the defendant in the execution had not his interest been sold.

EXECUTIONS—RIGHT OF OFFICER TO FOLLOW WRIT.—A sheriff who holds an execution issued against one partner individually is justified in following it, although the judgment creditor refers him to the files in the case showing that the note on which the judgment was entered was executed in the firm name, and claims that such execution was in fact for firm indebtedness.

EXECUTIONS AGAINST PARTNERSHIPS—APPLICATION OF PROCEEDS.—An officer having executions against an insolvent partnership, and also against individual members of the firm, is required to make application of the proceeds of firm property to the payment of the executions against the firm, even though such executions are junior to those against the individual members of the firm.

EXECUTIONS AGAINST PARTNERSHIP — SHERIFF WHEN NOT LIABLE FOR FALSE RETURN.—A sheriff who holds for collection chattel mortgages upon property of an insolvent partnership, and also an execution against a partner individually, may apply the proceeds of the firm property to satisfy the mortgages, although part of them were executed after he received the execution, without being liable for a false return on the execution, when nothing remains to satisfy it.

Action by C. F. Swan and others against J. H. Gilbert, sheriff of Cook county, for a false return upon an execution. Judgment for the defendant, and the plaintiffs appealed.

A. B. St. John, S. A. French, and D. W. C. Merriam, for the appellants.

Flower, Smith & Musgrave, for the appellee.

208 PHILLIPS, J. In determining the rights of the parties on the question presented in this record we shall proceed upon

the theory, not disputed, that all the property conveyed by the chattel mortgages and sought to be reached by the executions was partnership property. Further, that no question is raised as to the validity of the chattel mortgages executed before the confession of judgment, and [209] under which mortgages the deputy sheriff, as agent of the mortgagees, was in possession of the two stocks of goods at the time of the delivery to the sheriff of this execution. After the satisfaction of the prior three chattel mortgages there remained in the hands of the deputy sheriff two thousand two hundred and forty dollars. The only question to be determined is, whether this should have been applied on the execution of appellants against W. A. Cave, then in the hands of the sheriff, or should have been applied, as it was, upon the chattel mortgages of J. V. Farwell & Co., executed by the insolvent firm after appellants' execution was delivered to the sheriff.

It appears the firms of W. A. Cave & Co. and F. G. Mathison & Co. were insolvent, and their partnership property was not sufficient to satisfy partnership indebtedness. The evidence of one of the members of the firm shows this fact, and the appellate court has so found. Appellants object to such fact having been proved in the manner it was, but we see no reason why a member of a mercantile firm may not testify on a direct question put to him whether or not his firm was solvent or insolvent. After the payment of firm indebtedness, therefore, nothing would have remained in this instance to be distributed to the two partners, and therefore they had no interest, individually, in the firm property over and above such partnership indebtedness. It is true, a partner's interest in firm property may be sold under an execution against him individually, and such partnership interest will pass by execution to the purchaser; but such interest, when so acquired by the execution creditor, passes subject to the rights of partnership creditors and to the rights of other partners. Such purchaser would be compelled to settle with the other partners precisely as would the defendant in the execution had not his interest been sold. In this case the sheriff had in his hands two thousand two hundred and forty dollars, proceeds arising from the sale of firm property, and seventy-two dollars additional of firm money. He had in his hands two executions against the [210] members of this firm individually, and also two chattel mortgages given by them as a firm. There can be no question but it was his duty to apply the firm money on the firm indebtedness.

Appellants insist that their execution against W. A. Cave was in fact for firm indebtedness, and that they referred the sheriff to the note in the files in the case wherein their judgment had been rendered, as evidence of this fact. It was not error, however, for the sheriff to be governed by the writ delivered to him, which was against W. A. Cave alone. The partnership being insolvent, Cave's individual interest was worthless, therefore there was nothing of value to levy on, and the plaintiffs could not have been injured by the failure to levy.

In the case of Chandler v. Lincoln, 52 Ill. 74, it was said: "A partner's interest in the firm property may be sold under an execution, and that interest, whatever it may be, will pass by such a sale to the purchaser. But he takes it precisely as it was held by the defendant in the execution. If, on a settlement of the partnership affairs, defendant in execution is entitled to nothing, the purchaser would obtain nothing by his purchase. Such a purchaser would be compelled to settle with the other partner precisely as would the defendant in execution had his interest not been sold."

In Rainey v. Nance, 54 Ill. 29, this court said: "Where the separate property of either partner proves insufficient for the payment of his individual debts, and there is a surplus of the joint property after the payment of the firm debts, such separate creditors may resort to the share of the partner thus indebted to them in such surplus. In this case, then, the firm property must be applied in the discharge of the firm indebtedness before it can be applied to pay the debts of the individual members of the firm."

The case of Richard v. Allen, 117 Pa. St. 199, 2 Am. St. Rep. 652, was one where a constable levied executions against the individual [211] members of the firm upon firm property. Before the sale the sheriff levied an execution upon the firm property issued on a judgment against the firm. It was held the sale under the constable's writ only passed the interest of the individuals of the firm and the sale under the sheriff's writ passed the firm property, and the vendees under the constable's sale would only be entitled to relief after the satisfaction of the execution levied by the sheriff.

In Murfree on Sheriffs, section 545, it is said: "It sometimes happens that sheriffs fall into error in the execution of final process against an individual member of a partnership. The rule is, that he cannot levy upon any specific article of partnership property and segregate that as the property of the defend-

ant partner, but must levy upon the partner's interest in the whole stock. The only interest he has in the property is in the surplus after the partnership debts are paid and the accounts between the partners have been adjusted."

In Bates on Partnership, sections 1111, 1112, it is said: "The buyer at an execution sale cannot acquire a better title than the debtor partner had, and therefore does not acquire an absolute title to the chattels sold nor priority over partnership creditors, but his title is subject to the partnership debts and equities between partners, and he cannot be a partner by reason of delectus personarum. He becomes a claimant, in common with the copartners, for a share of the surplus. It follows, that in case the partnership is insolvent, or the debtors' and copartners' equities absorb the debtors' share, the buyer of the interest gets nothing; hence the sheriff is not liable if he allows the effects to be applied to the payment of the partnership creditor, nor even if he release the levy in case of insolvency, but as he does so at his own risk it is a very unsafe practice."

In Clements v. Jessup, 36 N. J. Eq. 569, which was a controversy between Clements, a creditor of the firm holding a chattel mortgage executed by both parties for [212] a firm debt, and Jessup, a purchaser at a sale under a judgment against one of the individual members of the firm, but which judgment was prior to the chattel mortgage in point of time, the court said: "The interest of a partner in partnership property is only his share on a division of the surplus after the payment of partnership debts, and partnership property must be applied first to the payment of firm debts. A purchaser directly from a partner of his interest in the firm property acquires no title in partnership property, except the vendor's share in the surplus after an accounting and adjustment of the partnership affairs. A sheriff having process of execution or attachment against one partner may seize and sell the latter's interest in partnership property, but a sale under such process will convey only the interest of the partner in partnershp property after the firm debts are paid and the affairs of the partnership are settled up." And as it appeared in that case that in the end the property would be required to pay the debts of the firm, the creditor of the individual member, although prior in point of time, was held to take nothing.

Commercial Bank v. Wilkins, 9 Me. 28, was an action of case against the sheriff for default in releasing certain personal property attached by him under an execution in favor of the plain-

tiff. It was held that the mere insolvency of a copartnership is sufficient to defeat an attachment made by a creditor of one member of the firm, although the partnership creditors have commenced no action for the recovery of their debts; that where an officer had attached partnership effects in a suit against one of the partners, and afterward, with the consent of the firm, suffered the effects to be applied to pay a partnership debt due to a stranger, he was not responsible to the first attaching creditor in an action for not having seized the goods on execution.

From a review of the foregoing decisions it seems to have been considered a circumstance of no importance [213] whether the creditors of the firm, where it was insolvent, had recovered judgment and were enforcing the collection of their demands or had ever commenced actions for the purpose, or if they had, in what stage these actions were at the time of the decisions, and in several of them the claim of a creditor of one or more indvidual members of the firm was resisted and disallowed because it did not appear whether the firm was solvent or not.

In the case of Lyndon v. Gorham, 1 Gall. 367, it was said: "If, upon the whole, it appears that the judgment debtor had only a nominal interest, I don't think that a greater interest can be conveyed under an execution, and, if the partnership be insolvent, that any interest can be conveyed."

In Rice v. Austin, 17 Mass. 197, it appeared that the defendant, as sheriff, had attached certain timber which he contended was the property of one Lindsay, and not of the plaintiff, but if not wholly Lindsay's, still he contended that it belonged to the plaintiff and Lindsay, as copartners. The court said: "It does not follow, necessarily, that a creditor of Lindsay might lawfully take partnership property. That must depend upon the solvency of the company, and upon the question whether any surplus remained for the separate partners after the payment of his debts to the company and the debts of the company to the world."

The case of Wilson v. Strobach, 59 Ala. 488, was a motion against the sheriff for judgment for failure to make certain money on an execution in his hands. The execution was against one member of the firm, and the complaint was made that the firm property was not levied on. The court said: "The interest of a partner may be sold to pay his individual indebtedness. It is well established in this state that the separate creditor of one partner may take, on execution, that partner's interest in the tangible property of the partnership, but the purchaser at the

sheriff's sale cannot take into his exclusive [214] possession the property which still remains subject to the debts of the partnership. The levy upon a partner's interest in an insolvent partnership may be released. A sheriff who has levied on the interest of one partner on a suit of his separate or individual creditor may release the levy when the partnership is insolvent and the sale of the partner's interest would have been unproductive of anything to satisfy the execution. On motion against the sheriff he may prove the insolvency of the partnership. On a motion against the sheriff for his failure to collect the money due on the judgment, it is competent for him to prove the insolvency of the partnership."

From these authorites, and on principle, it appears that an officer having executions against an insolvent partnership, and also against individual members of the firm, is required to make application of the proceeds of firm property to the payment of the executions against the firm, even though such executions are junior to those against the individual members of the firm. The officer, acting as agent of a mortgagee having a chattel mortgage for collection against a firm, may, when an execution against an individual member of the firm comes to his hands, apply the same principle without being liable for a false return. It is apparent, therefore, that Cave, the defendant in the execution, had no property subject to the lien of this execution, for the only interest an individual has in firm property is the surplus after the partnership debts are paid and the accounts between the partners have been adjusted.

The propositions of law asked by appellants and refused by the court, involving the questions of law discussed in this opinion, were properly refused by the trial court.

The judgment of the appellate court for the first district is affirmed.

PARTNERSHIP—EXECUTION AGAINST INTEREST OF ONE PARTNER—TITLE PASSING BY SALE.—There is a conflict of authority as to whether, when partnership property is seized upon the levy of a writ against an individual partner, there should be a levy upon specific chattels. But whatsoever be the mode of levy and sale authorized by the statutes or decisions of the state in which it takes place, there can be no doubt that the interest subject to the writ is, at least in equity, in no respect any greater than that held by the defendant, that it is subject to the paramount claims against the partnership, and is in fact, nothing beyond the right to demand an accounting, and to share in the surplus that may remain after all the partnership obligations have been discharged: See monographic note to Russell v. Cole, 57 Am. St. Rep. 440, 441.

PARTNERSHIP—PRIORITY OF WRITS AGAINST.—The levy of a writ against a partner upon his interest in its personal prop-

erty cannot prejudice the creditors of the firm. The property still remains answerable for the partnership debts, and a writ of attachment or execution for a partnership debt takes precedence over any previous levies or sales under writs against one member of the partnership only; and a purchaser under the former writ acquires title paramount to that of the purchaser of the latter writ, irrespective of the dates of the respective levies and sales: See monographic note to Russell v. Cole, 57 Am. St. Rep. 443; extended note to Morrison v. Blodgett, 29 Am. Dec. 663, 664.

DALLEMAND *v.* SAALFELDT.

[175 ILLINOIS, 310.]

MASTER AND SERVANT—NEGLIGENCE OF ELEVATOR PROPRIETOR.—The fact that the owner of an open elevator who operates, or allows it to be operated, with the doors leading into it open, with a bar across them, and the horizontal edge of the partition projecting downward from above, so as to make it unsafe to one on the ascending elevator and necessarily standing near the opening to work the cable, when taken in connection with the fact that such elevator is thus maintained in violation of a city ordinance, is sufficient to establish the negligence of the owner of the elevator toward an employé who is killed by falling into the shaft while operating the elevator.

NEGLIGENCE—CONTRIBUTORY—EVIDENCE.—A finding that an employé, killed by falling down an elevator shaft, was at the time exercising due care for his safety, is justified by evidence that he was an intelligent, sober, and careful man, when there was no eye-witnesses to the accident and no countervailing evidence.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—If it is no part of the duty of an employé to take goods up and down on an elevator, the dangers attending that work are not incidental to his employment, nor assumed by him by virtue of his contract of service although he understands how to run such elevator and has used it a number of times.

MASTER AND SERVANT—ASSUMPTION OF RISK—QUESTION OF FACT.—The question whether one employed to do a certain kind of work, and who was killed while doing another kind, was a mere volunteer, or was acting under the order of one having authority to direct him, is for the jury to determine, where a foreman gave such order to a group of men of which the deceased was one without specifying which was to act; and the deceased had done such work before and had not been forbidden to do it.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—If an employé performs a particular service outside the scope of his employment by order of his master, given through a foreman, the risk of injury while thus employed is not necessarily assumed by him by virtue of his employment, and though he has knowledge of the dangers of such service, he is not bound to disobey on pain of assuming the risk, but may perform the service and hold the master liable, unless the danger is such that an ordinarily prudent man would not encounter it. This rule applies to a servant using an elevator with knowledge of its unsafe condition.

M. Kavanagh and C. L. Brown, for the appellants.

Moses, Rosenthal & Kennedy, for the appellee.

[313] CARTER, C. J. The only error insisted upon by appellants is, that the trial court erred in refusing to give to the jury the instruction asked by them, at the close of the evidence, to find the defendants not guilty. We are therefore called [314] upon to decide whether or not the evidence, taken as true and in its most favorable bearing in support of plaintiff's cause of action, with all proper inferences which might be justifiably drawn from it, was so insufficient to support the judgment that it should for that reason be set aside. Whether or not the verdict should have been set aside as being against the weight of the evidence is, of course, a question of fact which has been finally settled. We have to do only with the question of law.

It is not contended that appellants were not in default in failing to comply with the ordinances of the city respecting elevators, but the first contention is, that such default was not the proximate cause of the injury—that no causal connection is shown between such default and the accident to the deceased. It is plain from the evidence that had the ordinance been complied with and the doors to the openings been kept closed the accident could not have happened. There was no opening between the platform of the elevator and the walls of the elevator shaft through which Saalfeldt could have fallen, and it is clear from the evidence that he must have fallen into the shaft from the open space at the doors after the elevator passed up, and, taking the evidence as true, this could have happened only at the fourth floor, and as Casey, who had charge of the work on the third floor, testified that it was only about a half a minute after the elevator started up from the third floor that he saw the deceased falling down the shaft beneath the elevator, we cannot say, as a matter of law, that it was an unjustifiable inference for the jury to draw that Saalfeldt was in some manner caused to fall from the elevator into the open space at the open doors of the fourth floor and from thence into the shaft beneath. As we understand the evidence, the platform of the elevator was supported by a framework of bars, but was not inclosed, and its entire front was open and of the same width as the doors—six feet. There was a wooden bar across the open doors at the fourth floor, three [315] feet and a half from the floor. These were double doors, eight feet and three inches high, and swung on hinges opening into the room. At the top, when closed, they fitted against or into the lower edge of the wooden partition or lining of the elevator shaft that extended up to the next opening. The operating cable was one foot

from the opening. We are of the opinion that it would not have been, in the eye of the law, an unreasonable conclusion for the jury to reach, from the evidence, that the combination of these open doors, with the bar across them and the horizontal edge of the partition projecting downward from above, were unsafe to one on the ascending elevator and necessarily standing near the opening to work the cable, and when this condition of things connected with the elevator was maintained by the appellants in violation of the city ordinances their negligence was sufficiently established. It seems not at all unreasonable that the jury should have found, not only that the defendants below were guilty of negligence, but that such negligence was the proximate cause of the injury. Both were questions of fact, and it would have been error had the court given an instruction to the contrary.

The evidence shows that Saalfeldt was an intelligent, sober, and careful youth, and from this evidence and the circumstances before them, and as there was no eye-witness to the accident and no countervailing evidence, the jury were authorized to find that he was, at the time of the injury, using due care for his own safety: Illinois Cent. R. R. Co. v. Nowicki, 148 Ill. 29. And as the record is made up, we must assume, if such an assumption were at all necessary, that the court below instructed the jury that the plaintiff could not recover unless they believed, from the evidence, that at the time of the accident he was observing due care, for the record shows that after the court refused the instruction to find defendants not guilty, other instructions were asked and given on behalf of each party, but they are not in the record.

316 So far we have a case where there is such evidence tending to prove that the injury complained of was caused by the neglect and default of the appellants, and while appellee's intestate was observing due care for his own safety, that the jury could, without acting unreasonably in the eye of the law, so find, thus making these questions of fact and not of law. A more serious question is presented by the objection urged that Saalfeldt, as the servant of appellants, assumed the risk as one incident to his employment. The general rule of law on this subject is too well settled and understood to require comment or citation of authority, but whether a given case comes within the rule is not always easy to determine. As a question of fact, it has, by the judgment of affirmance of the appellate court, been finally determined in this case that the risk was not in-

cident to the duties which, by his employment, Saalfeldt undertook to discharge, or else that the facts were such as to bring it within an exception to the general rule, and we are concerned only with the legal question whether or not there was any evidence on which such finding could reasonably be based. The witness Keating, who testified that he was the superintendent of appellants' whole business outside of the office, further testified that Saalfeldt was employed to wash bottles in the basement, that he had no other duties, and that he had nothing to carry upstairs or downstairs as a part of his duties. Cavanaugh also testified that that was no part of his duties. There was no one employed for the special purpose of running the elevator, but there was evidence that Saalfeldt had run it a number of times, and appeared to understand how to run it. The jury were warranted in finding, from the evidence, that it was no part of the duty of Saalfeldt to take cases of bottles up or down on the elevator, and that therefore the dangers attending that work were not incident to his employment nor assumed by him by virtue of his contract of service with his employers.

[317] But it is said that Saalfeldt volunteered to take the bottles up on the elevator without any order to do so by anyone having authority so to direct, and that in so doing he voluntarily assumed the risk also. We agree with the appellate court that it was a question of fact for the jury whether or not Saalfeldt acted voluntarily in taking the bottles up on the elevator, or in good faith upon the order of Cavanaugh. Cavanaugh had charge over the men in that department and gave the order to take up the bottles. Saalfeldt had done such work before, and had not been forbidden to do it. Cavanaugh, the foreman, did not specify which of the three men should obey him, and clearly the jury may have found that the order was addressed to the three men, to be obeyed by any one of them. Whether Saalfeldt properly acted in obedience to such order or not was clearly a question of fact for the jury, and not of law for the court.

It is, however, further contended that whether the risk was incident to his contract of employment and therefore one assumed by him, or whether it was incident to the special service which he undertook to perform in obedience to orders, the judgment is erroneous, because, it is said, he had knowledge of the condition of the elevator and its unsafe surroundings, and, having undertaken to perform it with such knowledge, he

could not hold his employers, the appellants, liable. He had been engaged in his work for appellants from five to seven weeks. The evidence does not show that they ever gave him any instructions regarding the use of the elevator or any information respecting the dangers to be guarded against in using it, and, in view of the facts and his inexperience and youth, it cannot be said, as a matter of law, that there was no evidence upon which a finding could be based that he did not have knowledge of the danger or that the danger was not apparent. Whether or not the danger was apparent, or he had knowledge of it, were questions of fact. Besides, the burden of showing such knowledge was [318] on the defendants below: 14 Am. & Eng. Ency. of Law, 844. Again, if the fact was—and in support of the judgment, there being evidence to the point, we will assume the jury so found—that Saalfeldt performed this particular service by order of his employers, given through the foreman, and that it was outside the scope of his employment, then the risk would be one which he did not, by virtue of such employment, necessarily assume: 2 Bailey on Master and Servant, sec. 3476, 3502; 14 Am. & Eng. Ency. of Law, 856, 857; Linderberg v. Crescent Min. Co., 9 Utah, 163; Pittsburgh etc. Ry. Co. v. Adams, 105 Ind. 151; and in such case, although he had knowledge of the dangers attending the use of the elevator in its unsafe environment, he was not bound to disobey on pain of assuming the risk, but might perform the service and hold his employers liable, unless the danger was such that an ordinarily prudent man would not encounter it: Ibid.; Illinois Steel Co. v. Schymanowski, 162 Ill. 447.

However weak the plaintiff's case may have been upon the evidence, we are unable to find, as matter of law, that any fact necessary to a recovery has been found without evidence to support the finding.

The judgment must be affirmed.

MASTER AND SERVANT—INJURY BY DEFECTIVE MACHINERY—ASSUMPTION OF RISKS—ELEVATORS.—A master's duty to his servant requires the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business in which the servant is employed, and in keeping such machinery and appliances in repair, including the duty of making inspection and test at proper intervals: Nord Deutscher etc. Co. v. Ingebregsten, 57 N. J. L. 400; 51 Am. St. Rep. 604, and note; McMahon v. Ida Min. Co., 95 Wis. 308; 60 Am. St. Rep. 117, and note. A servant is bound to know, and assumes the risk of, all defects in appliances about which he is employed that are open to observation, or can be ascertained by the ordinary exercise of the senses: Note to Louisville etc. R. R. Co. v. Stutts, 53 Am. St. Rep. 132; but as

to the condition of the appliances otherwise, he has the right to assume that those furnished him are safe: Note to Nord Deutscher etc. Co. v. Ingebregsten, 51 Am. St. Rep. 608. Owners of elevators must keep pace with science, art, and modern improvement in supplying safe vehicles, machinery, and appliances for their use: Treadwell v. Whittier, 80 Cal. 575; 13 Am. St. Rep. 175; and make them safe for all persons who have have a right to use them, or who use them with the owner's knowledge or consent: People's Bank v. Morgolofski, 75 Md. 432; 32 Am. St. Rep. 403. There is a distinction between the degrees of care required of elevator owners toward passengers therein, and toward employés using them: McDonough v. Lanpher, 55 Minn. 501; 43 Am. St. Rep. 541. See O'Brien v. Western Steel Co., 100 Mo. 182; 18 Am. St. Rep. 536.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF SERVANT INJURED.—A servant of mature age and intelligence, being required by the master to perform duties not embraced in the original hiring, and more dangerous, and undertaking the same through fear of losing his place, but knowing the increased risk, has no remedy against the master if he is injured by reason of his ignorance or inexperience: Leary v. Boston etc. R. R. Co., 139 Mass. 580; 52 Am. Rep. 733, and note. Compare Stephens v. Hannibal etc. R. R. Co., 96 Mo. 207; 9 Am. St. Rep. 336; Shortel v. St. Joseph, 104 Mo. 114; 24 Am. St. Rep. 317, and extended note.

ESTATE OF GROSSMAN.

[175 ILLINOIS, 425.]

WILLS—NUNCUPATIVE—EVIDENCE ESSENTIAL TO ESTABLISH.—To establish a nuncupative will it is imperative that two or more credible witnesses, who were present at the speaking and publishing of a will, must declare on oath that they were present and heard the testator pronounce the words, and that he at the same time desired the persons present, or some of them, to bear witness that such was his will, or words to that effect. Under the statute, the desire of the testator must be clearly manifested in some way that the witnesses bear witness to the will.

WILLS—NUNCUPATIVE—EVIDENCE INSUFFICIENT TO ESTABLISH.—A writing prepared from the testator's dictation while ill is not a nuncupative will though the words were spoken in the presence of credible witnesses, if the testator did not manifest any wish or desire that they act as witnesses to the words as his will, and such writing was to be prepared and submitted to the testator on the following day, before which time he died.

APPELLATE PRACTICE—JUDGMENTS.—The only question on appeal is whether the judgment of the lower court was correct or not, regardless of the reasons that may have been given for that judgment.

Flower, Smith & Musgrave, for the appellant.

Wilson, Moore & McIlvaine, A. D. Weiner, and A. Hirschl, for the appellees.

[426] CRAIG, J. This was a petition by Emma Bricher in the probate court of Cook county, praying that a certain document purporting to be the nuncupative will of Louis Grossman be admitted to probate. The court heard the testimony in sup-

port of the alleged will, and denied the application. An appeal was taken to the circuit court, where it was stipulated that a hearing might be had on the evidence heard in the probate court. After the evidence was read, the court instructed the jury to find that the alleged nuncupative will of Louis Grossman is not and was not the nuncupative will of the said Louis Grossman, and the jury returned a verdict in conformity to the instruction. An appeal was then taken to the appellate court, where the judgment of the circuit court was affirmed.

427 The proposed will offered in evidence is as follows:

"Be it remembered, that heretofore, on or about the 11th day of June, A. D. 1894, the undersigned, Frederick Grossman, of 5623 Dearborn street, Chicago, Dr. A. M. Harvey of St. Elizabeth Hospital, corner of Davis and LeMoyne streets, Chicago, Illinois, and William E. Burcky, of 6641 South Halsted street, Chicago, Illinois, were present at said St. Elizabeth's Hospital at the bedside of Louis Grossman, since deceased, a brother of the said Frederick Grossman. A consultation of physicians had just been held, and it had been decided that an operation should be performed upon the said Louis Grossman as the only chance of saving his life. After the consultation the undersigned, together with Frederick A. Grossman, were left alone with said deceased. Thereupon the undersigned, Frederick Grossman, stated to said deceased that an operation was the only means of saving his life, and that the time for the operation had been fixed for three o'clock on the afternoon of Monday, June 11. Said Frederick Grossman further asked said deceased whether, in view of the uncertainty of the result of said operation, he, Louis Grossman, wished to make any settlement of his matters. Louis Grossman said that he did. Thereupon Frederick Grossman secured pencil and paper. Louis Grossman then said: I give, etc.

"In testimony of the above we have set our hands hereto this 19th day of June, A. D. 1894.

"FREDERICK GROSSMAN,
"WILLIAM E. BURCKY,
"ANDREW M. HARVEY.

"The foregoing was read to Frederick Grossman, William E. Burcky, and A. M. Harvey in our presence and was subscribed by them in our presence.

"F. E. PRESTLEY, M. D., St. Elizabeth Hosp.
"W. R. LIVINGSTON, M. D., 269 LaSalle Ave.
"WM. B. McILVAINE, 502 N. State St.
"H. C. ADCOCK, 4459 Evans Ave."

Louis Grossman died at 10 o'clock in the forenoon of Monday, June 11th.

It is not questioned that the alleged will was reduced to writing within the time required by law, nor is there any controversy in regard to the form of the instrument. It is, however, contended that the instrument is invalid as a will, for the reason that the alleged testator, as appears from the evidence, never desired or requested any [428] person present, at the time the alleged will was made, to bear witness that such was his will.

Section 2 of chapter 148 of the Revised Statutes provides that all wills and codicils by which property shall be devised shall be in writing and signed by the testator or testatrix. Oral wills are, however, excepted from the operation of this section of the statute by section 15, which provides as follows: "A nuncupative will shall be good and available in law for the conveyance of personal property thereby bequeathed, if committed to writing within twenty days after the making thereof, and proven before the county court by two or more credible, disinterested witnesses who were present at the speaking and publishing thereof, who shall declare, on oath or affirmation, that they were present and heard the testator pronounce the said words, and that they believed him to be of sound mind and memory, and that he or she did at the same time desire the persons present, or some of them, to bear witness that such was his or her will, or words to that effect, and that such will was made in the time of the last sickness of the testator or testatrix," et cetera.

The facts which led to the making of the alleged will may be briefly stated, as follows: Louis Grossman was taken suddenly ill. A consultation of physicians was held at St. Elizabeth's hospital, where he was then lying, on the evening of Sunday, June 10, 1894, and it was decided that an operation would have to be performed. The time for the operation was fixed for 3 o'clock on the following Monday afternoon. His brother, Frederick Grossman, had learned of his illness on Sunday afternoon and had gone over to the hospital with his son, Frederick A. Grossman, and his son in law, Dr. William E. Burcky. After the consultation was concluded, Frederick Grossman asked the physicians whether his brother was in any danger of immediate death—whether it would be safe to postpone the settlement of his affairs. The reply of Dr. Fenger was, that the sick man would be in as good condition [429] at 3 o'clock on the following day as he then was, but it was stated that it would be ad-

visable to talk with him about his affairs, so that he could think them over before the operation and sign such papers as might be necessary. Thereupon the relatives mentioned, together with Dr. Harvey, the attending physician at the hospital, went to the room of the deceased and reported the result of the consultation. Frederick Grossman asked the deceased if he wished to make any disposition of his affairs—whether he wanted to attend to it, or whether he wanted it attended to. The answer given by the deceased, as Grossman testified, was as follows: "So he said, 'All right; you can take a statement of how I want it fixed,' and then Dr. Harvey gave me a slip from his prescription pad, or whatever it was, and a paper and pencil. This was in the presence of Andrew M. Harvey and William E. Burcky. I said, 'I will make a memorandum, and then fix it up in shape. If you think it is proper you can sign it and make a kind of will of it.' He said, 'All right.'" The deceased then made a statement of the disposition he intended to make of his property, and Frederick Grossman wrote down in pencil the statement as given. The next morning Frederick Grossman received a message by telephone that Louis was sinking very fast. He then wrote out a will from the data he had taken the previous night, but before it reached the hospital Louis was dead. The will in question was then prepared from the memoranda taken on the night of June 10th.

In the probate court Frederick Grossman, William E. Burcky, and Andrew M. Harvey, who were present when it is alleged Louis Grossman made his will, were called as witnesses for the purpose of proving the will. These witnesses concur in their evidence that they were present and heard the testator pronounce the said words, and that they believed him to be of sound mind and memory; but no one of the witnesses was able to testify that Louis Grossman desired them, or any person present, to bear [430] witness that such was his will. Indeed, all three of the witnesses testify that Louis Grossman said nothing whatever in regard to any person present bearing witness to the will. Dr. Harvey, one of the witnesses to the will, testified that Frederick Grossman said to him, "You are a witness," but that Louis Grossman never mentioned the word "witness" at all. In regard to the remark claimed to have been made by Frederick, he is contradicted by Frederick and by all others present, who testify that the subject was not mentioned by Frederick or any other person present.

As has been seen, in order to establish a noncupative will, the

statute is imperative that two or more credible witnesses who were present at the speaking and publishing of the will must declare on oath that they were present and heard the testator pronounce the words, and that he at the same time desired the persons present, or some of them, to bear witness that such was his will, or words to that effect. The fact that the words of the will may have been spoken in the presence and hearing of the witnesses is not enough, but the testator must in some way manifest his intention and desire that those present, or some of them, should bear witness that such was his will. If the testator says nothing at all in regard to witnessing the will, how can it be said that he desired or wished those present to bear witness to the will? The construction of this statute came before this court several years ago in Arnett v. Arnett, 27 Ill. 247, 81 Am. Dec. 227, and the court held that it was indispensable to the validity of a nuncupative will that the testator should request those present to bear witness that such was his last will, or that he should say or do something equivalent to such an expression. It may be true, as held in Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290, that no formal request of the testator to the attesting witnesses is required; but the desire of the testator must be clearly manifested in some way that the witnesses bear witness to the will. Here nothing was said by the testator
431 on the subject, and hence the record fails to show that the testator had any wish or desire in regard to the matter. Indeed, the fact that the testator called upon no one present to bear witness that the statement he made to Frederick Grossman was his will would seem to indicate that the statement was given, not as a will, but as a memorandum from which a will might afterward be prepared and submitted for execution. There is much evidence in the record tending to sustain this view. Dr. Burcky testified that after the memoranda had been read over to Louis, Frederick Grossman asked him if that was about what he wanted, "and he says yes, that is about what he wanted, and Frederick Grossman says, 'All right; I will write this up and send it over tomorrow morning, and you can look it over and if it is right you can sign it, and if it ain't right you can make it right.'" Frederick A. Grossman, the son, who was also present, testified: "After the substance of the will was stated, father read over the notes to Uncle Louis, and then told him that he would take these notes home and write them out and bring it in the next morning, and after he had seen it, if he wanted it that way, and if he wanted to make any changes that

he would have time to have it changed and make the changes before he signed it." The fact that Frederick Grossman prepared a will from the memoranda and sent it over the next morning for execution would seem to indicate that no will was intended. But however that may be, the proof of the alleged nuncupative will did not conform to the requirements of the statute, and the circuit court properly instructed the jury to find that the alleged will was not the nuncupative will of Louis Grossman.

It is said, however, that the circuit court decided against the validity of the will, not on the ground above suggested, but upon the ground the testator attempted to devise real estate, and as the will was invalid as to real estate it must be declared invalid as an entirety. [432] What ground the circuit court may have predicated its decision upon is immaterial. The only question here is, whether the judgment of the circuit court was correct or incorrect, regardless of the reasons that may have been given for that judgment.

The judgment of the appellate court will be affirmed.

WILLS—NUNCUPATIVE—ESSENTIALS OF PROOF.—Nuncupative wills demand strictness of proof in all essential points: and to be valid must be executed by the testator while in extremis, as a matter of necessity and not of choice: Scaife v. Emmons, 84 Ga. 619; 20 Am. St. Rep. 383. The words spoken must have been uttered by a person in extremis, who had, at the time of uttering such words, a present intent to make them his will, which intent should be distinctly indicated by calling upon some person present to take notice that he intended them as his will, or by doing some act from which it will clearly appear that the words were intended to be testamentary: Winn v. Bob, 3 Leigh, 140; 23 Am. Dec. 258; extended note to Sykes v. Sykes, 20 Am. Dec. 44-48. Two witnesses to a nuncupative will are required, who must both be present at the making thereof and hear the testator call both, or on two or more persons then present to remember that such is his will: **Note to Arnett v. Arnett, 81 Am. Dec. 230, 231.**

CHICAGO *v.* COLLINS.

[175 ILLINOIS, 445.]

INJUNCTION AGAINST VOID ORDINANCE.—The enforcement of a void city ordinance may be enjoined in order to prevent a multiplicity of suits at the instance of any person whose interests are impaired by it provided the rights of many persons are affected by the ordinance in the same way.

MUNICIPAL CORPORATIONS—BREACH OF PUBLIC TRUST—INJUNCTION.—A municipality is charged with a public trust, and if it is about to commit an act clearly illegal, the necessary effect of which is to impose heavy burdens upon the property of many citizens and taxpayers, it becomes amenable to the juris-

diction of equity for a breach of trust, and such court may interfere by injunction to prevent such act.

MUNICIPAL CORPORATIONS—VOID LICENSE TAX FOR USE OF STREETS.— A city has no power to impose by ordinance, a license fee by way of a tax on every person using wheeled vehicles on its streets for their individual use exclusively in their own business or for their own pleasure, as a means of locomotion.

MUNICIPAL CORPORATIONS—VOID LICENSE TAX.—A city may exact an occupation license for vehicles used in the transportation of goods and merchandise, or of passengers, or for other purposes of traffic, but it cannot impose a license tax for the mere use of the streets.

MUNICIPAL CORPORATIONS—RIGHT TO IMPOSE LICENSE FOR USE OF STREETS.—The use of the public streets of a city is not a privilege, but a right, and the city cannot exact a license for the use of such streets by an individual or the public in a reasonable manner.

MUNICIPAL CORPORATIONS—ORDINANCE CREATING DOUBLE TAX.—An ordinance of a city providing that money received from license fees imposed thereby on all wheeled vehicles shall be expended in improving the public streets, creates a double tax and is void, when such vehicles are taxed at their value, for general purposes.

TAXATION.—AUTHORITY TO IMPOSE a tax or to exact a license must clearly appear and must be strictly construed, and if there is any doubt as to the right, it must be resolved adversely to it.

Bill for an injunction. The appellees, numbering three hundred and seventy-three, all residents and taxpayers of the city of Chicago, filed a bill in behalf of themselves and all others similarly situated to enjoin said city from enforcing an ordinance providing that all wheeled vehicles used upon the streets of the city, including those used for private use, or for pleasure, should pay an annual license fee, and providing that any person using any wheeled vehicle without first having obtained such license, or failing to have such vehicle tagged to show that such license had been paid, should be liable to a fine upon conviction for each offense. Judgment for the plaintiffs, and the city appealed.

C. S. Thornton, corporation counsel, G. W. Browning, and C. B. Hirtzel, for the appellant.

Collins & Fletcher, for the appellees.

451 PHILLIPS, J. Two questions are presented by this record: Has a court of equity jurisdiction to enjoin the enforcement of an ordinance of a city? and, Has the city, under the express or implied powers conferred on it by the legislature, authority to adopt this ordinance?

The enforcement of a void city ordinance may be enjoined

in order to prevent a multiplicity of suits at the instance of any person whose interests are impaired by it. A court of equity, however, cannot determine whether the ordinance has been violated, but merely whether it is void. Where such court is resorted to on the ground of prevention of a multiplicity of suits, there must be a right affecting many persons: Poyer v. DesPlaines, 123 Ill. 111; 5 Am. St. Rep. 494; Chicago etc. R. R. Co. v. Ottawa, 148 Ill. 397. Pomeroy, in his work on Equity Jurisprudence, sec. 245, in treating of the jurisdiction of courts of equity on that ground, divides them into four classes, and in the third and fourth classes states the principle: "3. Where a number of persons have separate and individual claims and rights of action against the same party, A, but all arise from some common cause, are governed by the same legal rule and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as coplaintiffs, [452] or one of the persons suing on behalf of the others, or even by one person suing for himself alone. The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class. 4. Where the same party, A, has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons or brought by each of them against him, instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as codefendants." It is familiar that on this ground taxpayers of a town, city, or county, or other taxing district may file a bill to restrain or set aside an illegal general tax, whether personal or made a lien upon their respective property: Allwood v. Cowen, 111 Ill. 481; Kimball v. Merchants' Loan etc. Co., 89 Ill. 611; Searing v. Heavysides, 106 Ill. 85.

The claim that the failure of complainants to pay this tax and resort to legal actions to recover the amount precludes equitable interference cannot be sustained. Many cases undoubtedly exist where equity will interfere to protect an invasion of property rights where the remedy at law is not entirely adequate, and where peculiar difficulties intervene the jurisdiction will be upheld. In the present case, three hundred and seventy-three complainants have filed their bill for relief. Their grievance is precisely the same and arises from the same cause. The various parties aggrieved, although not jointly interested, are allowed to sue together for the express purpose

of avoiding a multiplicity of suits and to have the controversy settled in one hearing. The municipality is charged with a public trust, and where it is about to commit an act clearly illegal, the necessary effect of which will be to impose heavy burdens upon the property of citizens and taxpayers, it becomes amenable to the jurisdiction of equity for a breach of trust, and such court may interfere by injunction for the prevention [453] of such act. Where the controversy is between two parties only, or where but few persons are involved, then, unless complainant's rights have been established at law, a court of equity will not interfere: Poyer v. DesPlaines, 123 Ill. 111; 5 Am. St. Rep. 494; Chicago etc.R. R.Co. v. Ottawa, 148 Ill. 397; Yates v. Batavia, 79 Ill. 500.

No inflexible rule can be laid down for the determination of the question as to whether jurisdiction exists in a court of equity. In general, an adequate legal remedy will suffice to make such courts hesitate in acting. But inadequacy in granting relief for the determination of a right may arise from causes other than mere forms of remedy, and it will not do to sacrifice justice on the mere ground of the form of the remedy, where convincing facts show that adequate relief can best be had in the forum of a court of equity. In this case three hundred and seventy-three complainants present facts showing that between two hundred thousand and three hundred thousand citizens and taxpayers are affected by the provisions of the ordinance, and, if compelled to pay the illegal tax, hardship and injustice will result to an enormous number of persons. If they pay the tax and are compelled to resort to a court of law to recover back the amount so paid, the business of the courts will be obstructed by the number of actions of the same character. Long delay will ensue, and the costs to the persons so paying such illegal tax or license fee will be greater than the amount to be recovered. Under any circumstance, if the license exacted is illegal, it would amount to oppression and injustice to a large part of the population of the city of Chicago, and this bill presents a case for the jurisdiction of a court of equity.

The contention of appellant is, that the ordinance was lawfully passed under the powers delegated to the city by the general incorporation act, under which it was organized. That act, by section 1 of article 5, provides the common council shall have the following among other powers: Clause 4: "To fix the amount, terms, and manner [454] of issuing and revoking li-

censes." Clause 7: "To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, public grounds, and vacate the same." Clause 8: "To plant trees upon the same." Clause 9: "To regulate the use of the same." Clause 10: "To prevent and remove encroachments or obstructions upon the same." Clause 11: "To provide for the lighting of the same." Clause 12: "To provide for the cleansing of the same." Clause 92: "To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams or persons." Clause 75: "To declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist." Clause 78: "To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." Clause 66: "To regulate the police of the city, and pass and enforce all necessary police ordinances." Clause 96: "To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper; provided, no fine or penalty shall exceed two hundred dollars, and no imprisonment shall exceed six months for one offense."

The principal contention of appellant is, that under clause 9 of section 1 of the act, which grants power to the common council to regulate the use of the streets, the implied power is conferred to require a license to use the streets, as it has been frequently held by this court that, the power to regulate being expressly granted, the power to license as a means of regulation was clearly conferred: Chicago Packing etc. Co. v. Chicago, 88 Ill. 221; 30 Am. Rep. 545; Kinsley v. Chicago, 124 Ill. 359; Banta v. Chicago, 172 Ill. 204.

455 The streets and alleys of a city are held in trust by the municipality for the use of the public, for purposes of travel thereon and as a means of access to and egress from buildings abutting thereon or lots adjacent thereto. The right to travel on and along the streets of a city belongs to the general public, and does not belong to its denizens alone. The right to travel being in the general public everywhere, all persons have a right to pass along and use the streets and alleys of a city in all their parts, the full width and length thereof. The municipality,

which is a mere trustee of the public and holds the streets and alleys in trust for that public, cannot deny the right of the public to use the streets and alleys. It cannot assume an exclusive ownership, and deny the rights of the beneficiaries under their trust and arrogate to itself a power greater than that of a mere trustee, and prevent the use of the streets and alleys by individual members of the public. The right of the public to use the streets is the right to use them for purposes of travel in the recognized methods in which the public highways of the state are used. Any method of travel may be adopted by individual members of the public which is an ordinary method of locomotion, or even an extraordinary method, if it is not, of itself, calculated to prevent a reasonably safe use of the street by others. If a right exist in a city council to impose a license fee, by way of tax, on every person using wheeled vehicles thereon, it may in like manner impose such license fee for such use of the streets in every other manner of locomotion or travel, and reach the man on horseback or the pedestrian walking along the same.

The right conferred on the city council by the legislature to regulate the use of the streets and alleys of the city did not contemplate a power in a trustee of a beneficiary to deprive that beneficiary of a right. The power to provide, by ordinance, for planting trees in streets, to prevent encroachments upon or remove obstructions from the same, to provide for lighting and cleansing them; to [456] prevent and regulate the rolling of hoops, playing of ball, or flying of kites therein, or to prohibit any other amusement having a tendency to annoy persons, is conferred for the purpose of keeping the streets in a condition for public use and travel. Any usual method of travel along the streets and alleys of a city cannot be declared to be a nuisance. The city council may regulate the use of the streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians, and exclude certain character of loads and regulate the width of tires on vehicles used on a certain character of pavements, and provide that the rate of speed shall be much less on certain streets than on others, and otherwise regulate the use of the streets, having in view solely the welfare and safety of the public. The city many also regulate certain occupations, such as hackmen, draymen, expressmen, and the like, for such regulation is of a police character, having reference to the general welfare, as a means of preventing improper exactions and extortions; and for the same reason, a license may

be exacted for vehicles used in the transportation of goods and merchandise, or of passengers, or for other purposes of traffic; but such license is an occupation license, and not one for the use of the streets. The license in the latter-named case is designed to operate upon those who hold themselves out as common carriers, and a license may be exacted from such as a proper exercise of police power; but no reason exists why it should be applied to the owners of private vehicles used for their individual use exclusively, in their own business, or for their own pleasure, as a means of locomotion: Farwell v. Chicago, 71 Ill. 269; Joyce v. East. St. Louis, 77 Ill. 156; Collinsville v. Cole, 78 Ill. 114; St. Louis v. Grone, 46 Mo. 575; Livingston v. Paducah, 80 Ky. 657; Covington v. Woods, 98 Ky. 344.

Anything which cannot be enjoyed without legal authority would be a mere privilege, which is generally [457] evidenced by a license: Cate v. State, 3 Sneed, 120. The use of the public streets of a city is not a privilege, but a right. Tiedeman on Limitations of Police Power, section 281, says, in distinguishing between a license and a tax: "It is therefore conclusive that the general requirements of a license for the pursuit of any business that is dangerous to the public can only be justified as an exercise of the power of taxation or the requirement of a compensation for the enjoyment of a privilege or franchise." In Cooley on Taxation, page 596, it is said: "A license is a privilege granted by the state, usually on payment of a valuable consideration, though it is not essential. To constitute a privilege, the grant must confer authority to do something which without the grant would be illegal, for if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever."

A license, therefore, implying a privilege, cannot possibly exist with reference to something which is a right, free and open to all, as is the right of the citizen to ride and drive over the streets of the city without charge and without toll, provided he does so in a reasonable manner. That such a right exists in Chicago is recognized in Smith v. McDowell, 148 Ill. 51, where it was said relative to the streets of a city: "The grant of power in this particular is to be construed in view of the purposes for which the municipality is invested with the control of its streets, alleys, and public grounds. The municipality, in respect of its streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The funda-

mental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it."

Section 6 of the ordinance provides: "All moneys received from or collected from the operation and enforcement of this ordinance shall make a separate and distinct [458] fund, apart from all other moneys held or collected by the city government of the city of Chicago, and shall be known as the 'Wheel Tax Fund.' The sole use and purpose for which said wheel tax fund may be disbursed or expended shall be for the repair and keeping in good condition of such streets as are under the direction of the city government proper, and shall be expended only as the commissioner of public works shall authorize, in the improvement of such public streets as he may have directed to be placed in proper condition."

It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly. It is only when statutes are passed which impose taxes on false or unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any sense proportioned in their effect on those who are to bear the public charges, that courts can interfere and arrest the course of litigation by declaring such enactments void. It appears from the allegations of the bill and the stipulation of facts that the complainants are taxpayers, and were assessed for and paid an ad valorem tax equal to that assessed upon other personal property in the city. This ordinance, on its face, indicates that its purpose, in part, is to raise a special fund for the improvement of streets, and provides for the manner of its distribution, and this amounts to a double tax. The exaction imposed is a tax on specific articles of personal property which are required by law to be, and which the bill alleges have been, assessed for general taxation at their value, and upon which taxes have been paid. To tax them again by declaring by ordinance they shall not be used until another tax is paid, levied, as in this ordinance, without regard to values, is not only double taxation, but is a violation of the principle of equality and uniformity which is indispensable to all legal taxation. It imposes a heavier burden upon one class of taxpayers than is imposed upon others, and is [459] violative of the principle of equality and uniformity which must underlie all valid taxation. A statute which makes any kind of property the subject of taxation, and, discriminating, imposes upon it a double burden for

a single object, makes even approximate equality and uniformity impossible, because it is an arbitrary and radical departure from both.

The authority to impose a tax or to exact a license must clearly appear and must be strictly construed. If there is a doubt as to the right, it must be resolved adversely to it. In this case there is no express power given the city council to impose this license fee, and no implied power arises which gives the right. It has not power to levy a tax in this manner. In any view of the case, the city had no power to adopt this ordinance, and the injunction was properly made perpetual.

The decree of the circuit court of Cook county must be affirmed.

INJUNCTION AGAINST MUNICIPAL CORPORATIONS—INVALID ORDINANCES.—The enactment of void ordinances will not ordinarily be enjoined. The restrictive powers of the courts should be directed against the enforcement rather than against the passage of such ordinances: Stevens v. St. Mary's Training School, 144 Ill. 336; 36 Am. St. Rep. 438, and extended note. An injunction against the enforcement of a void municipal ordinance should be granted when there is no plain, adequate remedy at law, and it is necessary to prevent irreparable injury: Austin v. Austin City Cemetery Assn., 87 Tex. 330; 47 Am. St. Rep. 114; or where the execution of the ordinance injuriously affects private rights: Deems v. Mayor, 80 Md. 164; 45 Am. St. Rep. 339, and note. See Newmeyer v. Missouri etc. R. R. Co., 52 Mo. 81; 14 Am. Rep. 394, and note.

MUNICIPAL CORPORATIONS—CONTROL OVER STREETS—POWER TO TAX.—Municipal corporations may be vested with the power of taxation, but such power can only be exercised according to charters, and within the limits of the constitution of the state: Mauldin v. City Council, 42 S. C. 293; 46 Am. St. Rep. 723. The streets are held in trust for the public use, and are public for all purposes of free and unobstructed passage: Chicago etc. R. R. Co. v. Quincy, 136 Ill. 563; 29 Am. St. Rep. 334, and note. A municipal corporation cannot erect a toll-bridge and levy and collect tolls unless authorized by the law of the state: Clark v. Des Moines, 19 Iowa, 199; 87 Am. Dec. 423, and note. An ordinance imposing a tax on wagons of outside residents engaged in hauling into and out of the city is void: See monographic note to Robinson v. Mayor, 34 Am. Dec. 636.

LINNERTZ *v.* DORWAY.

[175 ILLINOIS, 508.]

EJECTMENT—ESTOPPEL IN PAIS—QUESTION FOR JURY.—If the plaintiff in ejectment shows title in himself by mesne conveyances from the defendant, and also shows possession in the latter, the case should be submitted to the jury, and the court commits error in directing a verdict for the defendant under evidence relied upon to establish an estoppel in pais against the plaintiff.

EJECTMENT—ESTOPPEL—BOUNDARIES.—The rule that owners of adjoining tracts of land, by parol agreement, or recog-

nition from which an agreement may be inferred, may settle and establish permanently the boundary line between their lands, which, if followed by possession according to such lines, is binding upon them and their grantees and estops them to claim title beyond such line, does not apply in an action of ejectment where it is sought to prevent one from asserting title to land established by him through a chain of title, on the ground that the acts of the parties to such chain of title establish an intention to transfer and convey another tract than that described in their deeds.

ESTOPPEL IN PAIS—EJECTMENT.—The acceptance by a grantee of a tract of land less than that described in his deed does not, in the absence of agreement, estop his grantee, in an action of ejectment, from asserting title to the land not so included in the deed, as against the original grantor.

EJECTMENT.—ESTOPPEL IN PAIS cannot be invoked in an action in ejectment in order to defeat the legal title to a permanent interest in lands. In such action the legal title must prevail.

W. Hartzell and J. B. Simpson, for the appellant.

H. C. Horner, for the appellee.

508 PER CURIAM. This was an action of ejectment brought by the plaintiff in error, against F. W. Brickey and others, defendants in error. The defendants other than Brickey were tenants under Brickey. The declaration claimed title in the plaintiff in error to a tract of land described therein by metes and bounds, being forty-three and sixty-one one-hundredths acres off the east part of survey 342, claim 2058, township 5 south, ranges 9 and 10 west. The defendants in error filed but a single plea, averring they were not, at the time of the beginning of the suit or at the time of filing the plea, in 509 possession of the premises in the declaration described. The issue raised by the declaration and the plea thereto was submitted to a jury for trial.

It was agreed that on the tenth day of January, 1855, the title to that part of survey 342 involved herein rested in the defendant, F. W. Brickey. The plaintiff introduced testimony from which it appeared, without controversy, this title had passed by mesne conveyances from him, the said Brickey, to the said plaintiff. The plaintiff produced a number of witnesses, among them one Gardner, who was a surveyor and deputy county surveyor of Monroe county, wherein the said land is situate. The testimony of these witnesses tended to establish that the premises described in the declaration were in the possession of the defendant Brickey. The said defendant Brickey did not deny but that he was in possession of the locus in quo referred to by these witnesses, but he insisted the tract so in

his possession was not the tract described in the declaration, and introduced evidence tending to sustain his contention, and further insisted the plaintiff was estopped, for reasons hereinafter referred to, to contend that the tract so possessed by the defendant was embraced in the tract described in the declaration. Unless the plaintiff was so estopped to urge that the premises in the possession of the defendant Brickey were comprehended within the description contained in the declaration, whether the tract of which the defendant was in possession is the tract described in the declaration was a question of fact to be determined by the jury.

At the close of all the testimony the defendant interposed a demurrer to the evidence. The court sustained the demurrer, discharged the jury, and entered judgment finding the defendant was not guilty of unlawfully withholding the premises described in the declaration.

We find in the testimony of the surveyor, Gardner, and in the testimony of other witnesses produced in behalf of plaintiff in error, evidence tending to show that the [510] locus in quo so confessedly in the possession of the defendant in error Brickey was within the limits of that part of survey 342 described in the declaration, and in the various deeds through and by which the plaintiff in error traced title thereto. Upon this branch of the case it cannot be said the evidence in support of the contention of the plaintiff in error, together with the intendments reasonably to be drawn therefrom, was so far insufficient to support his contention as to have justified the court in refusing to submit that question, as a question of fact, to the jury. Hence, unless the plaintiff in error was, as the defendant in error claimed, estopped to insist that the tract so in the possession of the defendant in error was within the limits of the tract described in the declaration, it is manifest the court erred in withdrawing the case from the jury and entering judgment against the plaintiff in error: Chicago etc. Ry. Co. v. Lewis, 109 Ill. 120; Bartelott v. International Bank, 119 Ill. 259; Ashley Wire Co. v. Mercier, 163 Ill. 486.

Defendant in error insists the evidence disclosed facts from which it is to be conclusively presumed, as a matter of law, the plaintiff in error became estopped to claim that the description of the premises in his declaration and in his deed referred to the premises in the possession of the defendant in error. The defendant in error alleged the facts so disclosed to be as follows: that he, the defendant in error, on the tenth day of Janu-

ary, 1855, was the owner of that part of the survey described in the declaration, and also of a tract lying immediately southeast thereof, to wit, the eastern part of the survey next adjoining on the southeast, and on that day sold and conveyed said portions of said surveys to one John Drury, and in the said deed to said Drury described the lands so sold and conveyed, as follows: "One hundred acres of the northeast end of survey 342, claim 2058, and survey 341, claim 2103"; that under and by virtue of said deed said Drury entered into possession of certain tracts [511] of land adjoining, upon the south, the tract of which the defendant was shown to be in possession; that the said Drury afterward sold, conveyed, and delivered the possession of the same tracts he purchased from and received possession of from the defendant in error, to one John J. Linnertz, father of the plaintiff in error; that said John J. Linnertz retained peaceable and undisturbed possession of the same locus in quo until the date of his death, in 1882, and that upon his death the title to the same premises and the possession thereof passed, under the laws of descent, to the plaintiff in error and his brother, Anton Linnertz; that Anton conveyed his undivided interest in and to said premises, and delivered possession thereof, to the plaintiff in error, who now holds such possession.

The position of the defendant in error is, that he sold to said Drury, and said Drury bought of defendant in error, other lands than the tract of which it was shown the defendant in error had the possession, and that the possession of such other land was, under the said conveyance, parted with by the defendant in error and accepted by the said Drury as being the lands comprehended within the descriptions employed in the deed, and that each successive grantor in the chain of title upon which the plaintiff in error relies sold and delivered to his grantee, including the plaintiff in error, said other tracts of land by the same description as that employed in the deed from Brickey to Drury, and that under said deeds each of the said grantees, including the plaintiff in error, entered into possession of the said other tracts, and that the plaintiff in error still has peaceable and undisturbed possession of said other tracts, holding the same under deeds of conveyance describing the said tracts he seeks as the same are described in the declaration in the cause.

The argument is, that by the acts of the various grantors and grantees through whom plaintiff in error obtained and claims title, and by his own acts, the descriptions of the land in the various deeds involved, [512] including the land held by the

plaintiff in error, have been applied to certain tracts of land, and the boundaries of the tracts so described thereby fixed and established, and so long acquiesced in that the parties to such deeds are to be deemed estopped from asserting that the descriptions in said deeds refer to other tracts of land now in the possession of the defendant in error. In support of this insistence we are cited to a number of cases decided by this court. We have examined all of such cases. The principle to be gathered from them is, that the owners of adjoining tracts of land, by parol agreement, or recognition from which an agreement may be inferred, may settle and establish permanently the boundary line between their lands, which, if followed by possession according to such lines so agreed upon, is binding upon such owners and upon their grantees, and estops each of them to claim title beyond such line. But in the case at bar there is no evidence that the parties, by express agreement or acts of recognition or acquiescence, fixed upon or attempted to fix upon any line as being a true boundary line between the adjoining premises. The action here is ejectment. The plaintiff in error established that he was the holder of the legal title in the premises described in his declaration, and should have prevailed unless he failed to establish the defendant in error was in possession of the tract to which he held such title. The effect of the proposed estoppel was not to prohibit the plaintiff in error from avoiding any agreement, express or implied, fixing a boundary line between his lands and the land of any other person, but to prohibit him from asserting ownership of lands the title to which he had established by the production of evidence which the law provides shall evidence the investiture of title, on the ground the acts and conduct of the parties to such instrument established that it was the intention to transfer and convey another tract of land than such tracts as were described in such instrument.

513 It is not permissible in an action of ejectment to invoke estoppels in pais in order to defeat the legal title to permanent interests in land: Winslow v. Cooper, 104 Ill. 235; Baltimore etc. R. R. Co. v. Illinois Cent. R. R. Co., 137 Ill. 9. Courts of chancery may afford relief of this character in a proper case, but in an action of ejectment the legal title must prevail. The principle upon which it is held boundary lines may be settled by agreements, and the parties to such agreements deemed estopped to disregard them, is not that title to land can pass by parol agreement, but that uncertainties as to the true location

of a mutual boundary line may be adjusted and settled by the voluntary agreement of the respective owners of adjoining premises, and that when such agreements are fairly and clearly made, the parties thereto shall not be allowed to reopen the controversy, but shall be required to abide their agreement: Cutler v. Callison, 72 Ill. 113; Quick v. Nitschelm, 139 Ill. 251. In the case last cited we said: "If the facts are not sufficient to show an actual agreement as to a boundary line, even though they amount to an estoppel in pais, it is to be observed that estoppels in pais affecting permanent interests in land can only be made available in a court of equity."

The action of the court in withdrawing the case from the jury cannot therefore be justified upon the ground the plaintiff in error had become estopped to contend that the defendant in error was in possession of the premises described in the declaration. We have seen the plaintiff in error produced testimony tending to show the defendant in error was so in possession of the premises. It was not necessary, in order to entitle the plaintiff in error to have that issue presented to and decided by the jury, that the court should have been of the opinion the preponderance of the evidence supported his contention, for that would be to deprive him of his constitutional right to have his cause determined by a jury. Unless the court [514] can say there is no evidence upon which the jury could, "in the eye of the law, reasonably find for the plaintiff," the issue must be determined by a jury: Frazer v. Howe, 106 Ill. 563; Offutt v. World's Columbian Exposition, 175 Ill. 472.

The judgment must be reversed and the cause remanded.

EJECTMENT—IMPORTANCE OF LEGAL TITLE—ESTOPPEL IN PAIS.—Only legal titles can be investigated in an action of ejectment, and the equitable title of the defendant cannot be shown in defense: Kirkpatrick v. Clark, 132 Ill. 342; 22 Am. St. Rep. 531; McKay v. Williams, 67 Mich 547; 11 Am. St. Rep. 597; Shaw v. Hill, 83 Mich. 322; 21 Am. St. Rep. 607. In some states the rule is different: Note to Kirkpatrick v. Clark, 22 Am. St. Rep. 538; Morrison v. Wilson, 13 Cal. 494; 73 Am. Dec. 593; Crary v. Goodman, 12 N. Y. 266; 64 Am. Dec. 506, and note; Neill v. Keese, 5 Tex. 23; 51 Am. Dec. 746; Clyburn v. McLaughlin, 106 Mo. 521; 27 Am. St. Rep. 369, and note; Hagan v. Ellis, 39 Fla. 463; 63 Am. St. Rep. 167, and note. An agreement by mistake upon an erroneous line as a boundary, supposing it to be the true one, will not operate as an estoppel upon the parties where the true line is unquestionable: McAfferty v. Conover, 7 Ohio St. 99; 70 Am. Dec. 57, and note.

St. Louis Southwestern Railway Company v. Elgin Condensed Milk Company.

[175 Illinois, 557.]

CARRIERS—BILLS OF LADING—PRIOR CONTRACT NOT SUPERSEDED BY.—An antecedent oral contract between a shipper and carrier, entirely independent and distinct from the subsequent bill of lading, which seeks to limit the carrier's liability, is not superseded thereby.

WITNESSES—EXPERT EVIDENCE.—Witnesses who have had from eight to twenty-five years' experience in manufacturing, handling, dealing in, and shipping condensed milk are competent as experts to testify as to the effect of transferring such milk from refrigerator-cars to box-cars, and carrying it a long distance in the latter.

CARRIERS—LIABILITY ASSUMED BEYOND TERMINUS. A common carrier may contract to carry and deliver goods at a place beyond the terminus of its own route, and it thereby becomes liable as a carrier for the whole distance. The connecting carriers then become its agents, for whose negligence or default it is responsible.

APPELLATE PRACTICE.—Every unguarded expression by a court in stating reasons for a ruling in the presence of the jury cannot be treated as error requiring a reversal, and unless inadvertent remarks of the court operate to the injury of the appellant, they are not sufficient to reverse a judgment.

APPELLATE PRACTICE.—IF INSTRUCTIONS ALREADY GIVEN correctly state the law, it is not error to refuse to give others or to refuse to modify those already given.

APPELLATE PRACTICE.—QUESTIONS OF FACT in actions at law are conclusively settled by the judgment of the appellate court affirming the judgment of the trial court.

Action to recover for breach of a shipping contract. The plaintiff was a manufacturer of condensed milk at Elgin, Illinois. The defendant was a common carrier and operated a railroad in Cairo, Illinois, in connection with a railway from Bird's Point, Missouri, through a part of Texas, and kept an office at Cairo. By its authorized agent, in consideration that plaintiff would ship its milk from Elgin over the Chicago and Northwestern Railway to Dixon, thence over the Illinois Central Railway to Cairo, so that it might be transported to its destination by the defendant, the latter agreed orally with plaintiff to furnish it refrigerator-cars at Elgin, and that the milk, when loaded therein by plaintiff and received by defendant at Cairo, should not be removed therefrom, but should be transported in such cars by defendant over its lines and other lines to its place of destination in Galveston, Texas. Plaintiff loaded certain refrigerator-cars furnished by defendant with condensed milk, and the latter received such cars at Cairo, but, instead of send-

ing them through to their destination without change as per such contract, the defendant transferred the milk from the refrigerator-cars to box-cars, and then shipped it to Galveston, whereby the milk was damaged. Plaintiff obtained judgment in the trial court, and that judgment was affirmed by the appellate court. Defendant appealed to this court.

Green & Gilbert, for the appellant.

W. N. Butler and A. Leek, for the appellee.

559 PHILLIPS, J. By the adjudication of the trial and appellate courts the questions of fact have been conclusively determined. By the judgments of those courts it is settled that the contract was made as alleged in some of the counts of plaintiff's declaration; that it was made by an authorized agent; that the milk was shipped from Elgin, Illinois, in good condition, in refrigerator-cars, under said contract, and was delivered to appellant at Cairo, Illinois, in those cars, and was by appellant transferred to box-cars and in them carried to Galveston, Texas, and was damaged by being so transferred from refrigerator to box-cars and carried therein from Cairo to Galveston; that the cases of milk returned to the depot of the International and Great Northern Railroad Company at Galveston were damaged, and were disposed of at the best price obtainable at the nearest market; that the damage sustained was to the extent as found by the jury, and that the verdict was not excessive.

560 The appellant contends that the verbal agreement was superseded by the subsequent written contract. The written contract relied upon as superseding the verbal agreement was that expressed in the bills of lading issued by the Chicago and Northwestern Railroad Company, and which sought to limit its liability. This suit is not brought on the contract embraced in the bills of lading, but on a separate and distinct contract entered into between appellant and appellee, which was in no manner affected by the bills of lading. The antecedent contract on which this suit was brought was entirely independent and distinct from that in the bills of lading, and was not superseded thereby.

Objection is made to the admission of expert evidence, because the witnesses sought to be examined did not possess sufficient knowledge in reference to the effect of heat and cold on milk, or the effect of transferring condensed milk from refrigerator-cars to box-cars and carrying it a long distance in the

latter. The witnesses thus examined had from eight to twenty-five years' experience in manufacturing, handling, dealing in, and shipping condensed milk, and from their answers and experience it appears they were competent as experts. The hypothetical question put to witnesses, and allowing their testimony, were not error.

The agent of the terminal road at Galveston was called as a witness. It had been shown that six hundred and sixty-two cans of milk of the different shipments made to appellee's consignee were by the latter returned to the depot of that terminal road. Appellant had sought to show that the agent of that road was not in any manner its agent, and the following question was asked the witness by appellant's counsel: "I will ask you if you or your railroad company had any knowledge from Mr. Ujffy as to when these six hundred and sixty-two cans of milk were brought back to the depot, except the general knowledge that he desired them shipped when a sufficient quantity accumulated?" To this question [561] appellee's counsel objected, and the objection was sustained. In ruling on the objection the judge stated, in its discussion, "I hold as a proposition of law Mr. Becker was the agent of defendant," to which remark and ruling of the court defendant objected and excepted. Thereupon the court said to the jury: "Gentlemen, my remark as to the law was addressed to the attorneys, and not to you, and you will disregard it. At the proper time I will instruct you in writing as to what the law is."

A common carrier may enter into a contract to carry to a place beyond the terminus of its route, and thereby become liable as a carrier for the whole distance. All connecting carriers, under such a contract, become the agents of such contracting carrier, for whose negligence or default it is responsible. The contracting carrier cannot evade, by contract, the consequences of the negligence of such connecting carriers any more than the results of its own: Illinois Cent. R. R. Co. v. Frankenberg, 54 Ill. 88; 5 Am. Rep. 92; Chicago etc. R. R. Co. v. Northern Line Packet Co., 70 Ill. 217; Hutchinson on Carriers, 117. Under the evidence that was before the jury at the time of this ruling the court could well hold the terminal road and its agent were the agents of the contracting road; but, as the question was one of fact, it was for the jury, and in ruling on the admissibility of evidence it should be in such a manner as that the judge should express no opinion on the evidence. Every unguarded expression in stating reasons for rulings cannot be

treated as error requiring a reversal. It is not unusual, in ruling on the admissibility of evidence, to refer to antecedent evidence and the principle deduced therefrom, and, unless inadvertent remarks of the court operate to the injury of appellant, it will not be sufficient cause to reverse: Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329; 9 Am. St. Rep. 598. In this case the jury were promptly instructed that the remark as to the law was addressed to the attorneys and should be disregarded by them, as they would be instructed in writing as to the law.

562 Objection is made to the giving of instructions for the plaintiff and in refusing and modifying instructions asked by the defendant. Two instructions were given for the plaintiff and thirty-one asked by the defendant, twenty of which were given as asked, three modified and given, and eight refused. Those given for the plaintiff correctly stated the law. Those given for the defendant stated the law favorably in every phase of the question presented by the defense. There was no error in refusing or modifying instructions.

This case is one to be determined from the facts, and their determination by the circuit and appellate courts precludes our consideration of them.

From a careful consideration of the record we find no reversible error, and the judgment of the appellate court for the fourth district is affirmed.

BILLS OF LADING — PRIOR VERBAL NEGOTIATIONS SUPERSEDED.—All prior verbal negotiations between a shipper and a common carrier are merged in the bill of lading or contract of shipment: McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343; 1 Am. St. Rep. 721. In the absence of fraud, imposition, or mistake it is presumed to embody the entire agreement of the parties. Prior and contemporaneous parol stipulations are deemed merged in the writing, and parol evidence is inadmissible to vary, control or contradict it: See monographic note to Chandler v. Sprague, 38 Am. Dec. 409, on bills of lading.

CARRIERS—LIABILITY ASSUMED BEYOND TERMINUS.—A railroad company receiving goods consigned to a place beyond the terminus of its own line undertakes to convey the same safely to the point of destination, and will be liable for the loss of such goods on connecting lines: Note to Cavallaro v. Texas etc. Ry. Co., 52 Am. St. Rep. 103; see Alabama etc. R. R. Co. v. Thomas, 89 Ala. 294; 18 Am. St. Rep. 119, and note; Bird v. Railroads, 99 Tenn. 719; 63 Am. St. Rep. 856, and note. Connecting carriers become agents of the original carrier: Note to Adams Ex. Co. v. Harris, 16 Am. St. Rep. 319.

APPEAL—ERROR NOT PREJUDICIAL cannot work a reversal of judgment: Farwell Co. v. Wolf, 96 Wis. 10; 65 Am. St. Rep. 22; Pacific etc. Co. v. Bear Valley Irr. Co., 120 Cal. 94; 65 Am. St. Rep. 158.

INSTRUCTIONS—WHEN PROPERLY REFUSED.—If there is no reversible error in the instructions given, there can be no re-

versal for a failure to give additional instructions: Tracy v. Hackett, 19 Ind. App. 133; 65 Am. St. Rep. 398; Galveston etc. Ry. Co. v. Gormley, 91 Tex. 393; 66 Am. St. Rep. 894.

SMITH *v.* MICHIGAN BUGGY COMPANY.

[175 ILLINOIS, 619.]

MALICIOUS PROSECUTION OF CIVIL SUIT BY SUMMONS ONLY.—An action for damages for the malicious prosecution of a civil suit without probable cause cannot be maintained, when the process in the suit so prosecuted is by summons only, and is not accompanied by the arrest of the person or seizure of property or other special injury, not incident to all similar suits.

Smith, Shedd, Underwood & Hall, for the appellant.

Meek, Meek & Cochrane, for the appellee.

624 MAGRUDER, J. The suit, which was begun by the defendant in error against the plaintiff in error in Michigan, was an ordinary civil suit, and resulted in favor of plaintiff in error. It is alleged in the declaration in the case at bar, that the suit in Michigan was a malicious prosecution and without probable cause; but it is not alleged nor claimed that, in that suit, the plaintiff in error was arrested, or that any of his property was seized; nor does it appear that the plaintiff in error therein suffered any special damage over and above the ordinary expenses and trouble which are attendant upon the defense of an ordinary civil suit. The question, therefore, which is presented in this case, and the only question which we deem it necessary to consider, is whether damages can be recovered for the malicious prosecution without probable cause of an ordinary civil suit, begun by personal service of process, and unaccompanied either by an arrest of the person or by seizure of property. It is well settled that malicious prosecution is a proper action for the recovery of damages for the institution of a civil suit with malice and without probable cause, where the defendant is deprived of his personal liberty, or where there is an attachment or seizure of his property. But whether malicious prosecution will lie in such case, in the absence of any interference with personal liberty and in the absence of any seizure of property, is a question upon which the authorities are very much divided.

The question above indicated has never been squarely decided in any case that has come before this court. In Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245, it was held that an action could not be maintained for maliciously suing out a writ 625

of injunction. The conclusion reached in that case, however, was based mainly upon the ground that the party had a sufficient remedy upon the injunction bond, given when the injunction was obtained; and that such bond was designed by the statute to cover the damages suffered by the party enjoined. But the drift of the opinion in that case was against the maintenance of an action for malicious prosecution without probable cause of an ordinary civil suit, unaccompanied by arrest or seizure of property. In Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245, we said: "We are well aware that elementary writers and respectable courts have held that an action on the case will lie for an abuse of the process of the courts, where special damages are alleged, and against a party for prosecuting a causeless action prompted by malice, by which the defendant has sustained some injury, for which he has no other recourse or remedy. Such actions, however, for the most part, are actions wherein arrests have been made and bail demanded, or the party put to some other expense and inconvenience, which cannot be compensated in any other mode than by an action. Such actions, except where a malicious arrest is charged, are not favored by the courts, and ought not to be, for in a litigious community every successful defendant would bring his action for a malicious prosecution, and the dockets of the courts would be crowded with such suits."

The question here under consideration has been much discussed of late years in legal periodicals and in text-books, as well as in judicial decisions rendered by the courts in many of the states. We have examined the discussions upon this subject with great care, and are inclined to hold in accordance with the intimation, made in Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245, that such actions ought not to be maintained.

An able discussion of this subject, and an extensive review of the authorities in relation thereto down to the year 1878, may be found in 21 American Law Register, [626] pages 281, 353. The articles there published were written by Mr. John D. Lawson. After his review of the cases, Mr. Lawson announces it as his own opinion, "that, while the weight of authority denies the action, the weight of reason allows it." The conclusion announced by the author of these articles has been followed by courts of last resort in several of the western and newly created states. But, as the weight of authority denies the action, we, as a court, feel it our duty to be governed by the weight of authority rather than by the conclusion of any

law-writer, however able and ingenious his reasoning may be. The author of these articles, after giving the substance of the English and American decisions upon this subject, fairly and frankly states the following conclusion therefrom, before he announces his own judgment in opposition to such conclusion, to wit: "We have now reviewed all the American cases pro and con; and the weight of authority appears to be against the right of action for the unfounded and malicious prosecution of an ordinary civil action. With the majority are all but one of the text-writers we have cited—Swift, Townsend, Addison, and the editors of the American Leading Cases, who follow the English adjudications; Mr. Weeks, who limits the right to 'extremely vexatious suits where special damage has been actually suffered,' and Judge Cooley, who discourages the remedy without positively denying the right. On the other side is Mr. Hilliard, who evidently favors the action, but unfortunately relies upon cases which do not sustain it at all."

Another review of the authorities may be found in 41 Central Law Journal, page 449.

The learned author of the article on "Malicious Prosecution" in 14 American and English Encyclopedia of Law, beginning on page 32, also refers to and states the substance of the cases on both sides of the question. It is there said: "At common law, the defendant in an action maliciously brought without probable cause has a right [627] of action against the plaintiff in such action after its termination in favor of such defendant, and this regardless of whether the plaintiff had interfered with either the person or property of the defendant. But, after the enactment of the statute of Marlbridge in the fifty-second year of Henry III, giving costs to successful defendants by way of damage against the plaintiff pro falso clamore, it came to be held that an action for malicious prosecution would not lie in civil actions, unless in cases where there had been arrest of the person, or seizure of property, or other special injury, which would not necessarily result in all suits prosecuted to recover for like causes of action. And this is the rule adopted by some of the courts of this country. The contrary rule, adopted by courts equal in number and respectability, is that an action can be maintained, where neither the person nor the property was seized, for damages accruing in suits brought maliciously and without probable cause." We prefer to adopt, as the sounder rule, the rule first stated in the passage last above quoted.

We are of the opinion, and so hold, that an action for the ma-

licious prosecution of a civil suit without probable cause will not lie where the process in the suit so prosecuted is by summons only, and is not accompanied by arrest of the person, or seizure of the property, or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action. This conclusion is sustained by the following authorities, towit: Potts v. Imlay, 4 N. J. L. 330; 7 Am. Dec. 603; Bitz v. Meyer, 40 N. J. L. 252; 29 Am. Rep. 233; Muldoon v. Rickey, 103 Pa. St. 110; 49 Am. Rep. 117; Kramer v. Stock, 10 Watts, 115; Eberly v. Rupp, 90 Pa. St. 259; Mayer v. Walter, 64 Pa. St. 283; Wetmore v. Mellinger, 64 Iowa, 741; 52 Am. Rep. 465; Smith v. Hintrager, 67 Iowa, 109; McNamee v. Minke, 49 Md. 122; Supreme Lodge etc. v. Unverzagt, 76 Md. 104; Terry v. Davis, 114 N. C. 31; Ely v. Davis, 111 N. C. 24; Mitchell v. Southwestern R. R. Co., 75 Ga. 398; Newell on Malicious Prosecution, sec. 32.

628 Those who favor the doctrine that the courts ought to permit suits of this character to be brought and prosecuted urge in support of it the common-law maxim that for every wrong the law furnishes a remedy. It is said that, when a civil suit is maliciously prosecuted without probable cause, the defendant undergoes expenses, and suffers injury from loss of time, and often from loss of credit; and that these wrongs he must endure without a remedy, if he cannot bring suit for damages for the prosecution of such malicious action. On the other hand, it must be remembered that the courts are open to every citizen; and every man has a right to come into a court of justice and claim what he deems to be his right without fear of being prosecuted for heavy damages. If such actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights through fear of being obliged to defend a subsequent suit, charging him with malicious prosecution.

It is urged that the costs, which are awarded to the successful defendant in a civil suit malicious in its character and brought against him without probable cause, are inadequate compensation for the injury which he suffers. But the question of the amount of costs which are to be allowed the successful party is a question to be determined by the legislature, and not by the courts. As was said by Chief Justice Kirkpatrick in Potts v. Imlay, 4 N. J. L. 330, 7 Am. Dec. 603: "The courts of law are open to every citizen, and he may sue toties quoties upon the penalty of lawful costs only. These are considered as a

sufficient compensation for the mere expenses of the defendant in his defense. They are given to him for this purpose, and he cannot rise up in a court of justice and say the legislature has not given him enough. If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses both of time and money; but those to whom this high trust is [629] committed in this state have thought, and we will presume have wisely thought, otherwise." Such ordinary trouble and expense as arise from the ordinary forms of legal controversy should be endured by the law-abiding citizen as one of the inevitable burdens which men must sustain under civil government: Muldoon v. Rickey, 103 Pa. St. 110; 49 Am. Rep. 117. In the case at bar, there was introduced in evidence a transcript of the record of the action which was tried in Michigan. This transcript shows that a considerably larger bill of costs is allowed against the defeated party in a civil action in the state of Michigan than is allowed in the state of Illinois and in many of the other states. It appears from the defendant's bill of costs in the Michigan suit that the present plaintiff in error was allowed attorneys' fees for services before notice of trial, after notice of trial, and during the trial, and upon continuance of the cause; and that he was furthermore allowed a reporter's fee, and witness fees on trial, including days and miles traveled by the plaintiff in error and a witness who went to Michigan from Illinois to testify. The total taxation of costs in behalf of plaintiff in error in the Michigan suit was seventy-four dollars and seventy cents.

Those who favor this species of action also claim that, if the courts refuse to allow such actions to be maintained, litigation will be encouraged, and causeless and unfounded civil suits will be apt to be brought. On the contrary, the danger is that litigation will be promoted and encouraged by permitting such suits as the present action to be brought. This is so, because the conclusion of one suit would be but the beginning of another. A defendant who had secured a favorable result in the suit against him would be tempted to bring another suit for the purpose of showing that there had been malice and want of probable cause in the prosecution of the first suit which he had won. Litigation would thus become interminable. Every unsuccessful action would be apt to be followed by another, alleging malice in the prosecution [630] of the former action. There would thus be substantially a trial of every lawsuit twice

instead of once, because, in order to show that the first suit was malicious and without probable cause, it would be necessary to go over again the material facts that had been developed by the proof in such suit.

Again, if every successful defendant should be encouraged to bring an action against the defeated plaintiff for the malicious prosecution without probable cause of an ordinary civil suit, such defendant would be careless and extravagant in the matter of the cost of the defense made by him. It would be a matter of little importance to the successful defendant whether his contract with his attorney for the latter's professional services provided for extravagant or reasonable fees, if he could turn around at once and recover from the defeated plaintiff whatever he had expended. His expenses and trouble and loss of time and credit would assume larger proportions, and would be regarded as heavier burdens, if he knew that he was to be reimbursed for such outlay from the property of his adversary.

In addition to this, there is no reason why a plaintiff may not bring an action against a defendant who has made a groundless and causeless defense, if the defendant may sue for damages which he has suffered for an unfounded prosecution.

For the reasons stated, we are of the opinion that the court below committed no error in instructing the jury to find for the defendant below, the defendant in error here. Accordingly, the judgment of the appellate court, affirming the judgment of the circuit court, is affirmed.

MALICIOUS PROSECUTION—ARREST OR INTERFERENCE WITH PROPERTY AS AN ESSENTIAL.—Whether a malicious suit, without probable cause, where there is no seizure of the defendant's body or goods, will be a sufficient ground for an action of malicious prosecution, is a question upon which the authorities are divided: See monographic notes to Williams v. Hunter, 14 Am. Dec. 601, and Ross v. Hixon, 26 Am. St. Rep. 130. In support of the principal case, see Potts v. Imlay, 4 N. J. L. 330; 7 Am. Dec. 603; Bitz v. Meyer, 40 N. J. L. 252; 29 Am. Rep. 233; Muldoon v. Rickey, 103 Pa. St. 110; 49 Am. Rep. 117. Contra, Smith v. Burrus, 106 Mo. 94; 27 Am. St. Rep. 329; Antcliff v. June, 81 Mich. 477; 21 Am. St. Rep. 533; Brand v. Hinchman, 68 Mich. 590; 13 Am. St. Rep. 362, and notes thereto.

CASES

IN THE

APPELLATE COURT

OF

INDIANA.

HYATT *v.* WASHINGTON.

[20 INDIANA APPEALS, 148.]

INJUNCTION BONDS.—ATTORNEY'S FEES, for defending an injunction suit at the trial on the merits may be recovered in an action on the bond, although the injunction was not the sole object of the action.

INJUNCTION BONDS—APPELLATE PRACTICE.—The fact that the names of the sureties do not appear in the body of an injunction bond is not material on appeal, when the court approved the bond when the restraining order was issued.

INJUNCTION BONDS—OBLIGEES.—If the names of two officials of a city are designated as such, and they are named as obligees in a bond given in a suit against the city for an injunction, any rights under such bond do not accrue to such officers as individuals, but as officers of the municipality.

A. J. Padgett and J. A. Padgett, for the appellants.

C. K. Tharp, for the appellees.

149 ROBINSON, C. J. Appellants, in a former suit, had obtained a temporary restraining order against appellees. The injunction bond was conditioned to pay appellees all damages and costs which might accrue to them by reason of the injunction and restraining order which might be issued. On final hearing the injunction was dissolved. This action was brought upon the bond, to recover fees paid to counsel for services rendered at the trial of the case on its merits, which resulted in the dissolution of the injunction.

It appears that no motion was made nor services rendered in resisting or attempting to dissolve the temporary restraining order, and that the services rendered were at the trial of the case on its merits. And it is argued by appellant's counsel that such services do not come within the conditions of the bond,

and that they are not damages resulting from the granting of the temporary restraining order. It is held that where the injunction is the sole object of the action, the necessity of paying counsel fees in defending the case on its merits is an actual damage sustained by reason of the injunction, and such fees may be recovered in an action on the bond: Raupman v. Evansville, 44 Ind. 392; Noll v. Smith, 68 Ind. 188. And it is further held that where other and additional relief is sought in such cases, counsel fees may be allowed, but that they should be restricted to such fees as are necessarily paid in defeating the injunction. And in the case at bar the record discloses that the trial court limited the recovery to the amount expended for fees on account of the injunction branch of the case: See Robertson v. Smith, 129 Ind. 422; 2 High on Injunctions, sec. 1688; Swan v. Timmons, 81 Ind. 243; Beeson v. Beeson, 59 Ind. 97.

While the above cases do not expressly so hold, yet, reasoning from the rules they declare, we are of the [150] opinion that the correct rule is that attorney's fees for defending an injunction suit at the trial on the merits may be recovered in an action on the bond, although the injunction was not the sole object of the action.

The names of the sureties do not appear in the body of the bond, but that is not material, as the court approved the bond when the restraining order was issued: Griffin v. Wallace, 66 Ind. 410; Potter v. State, 23 Ind. 550.

Construing the complaint and the bond, filed as an exhibit, together, it is evident that the city of Washington is the real party in interest. There is, in effect, but one obligee named in the bond. Any right accruing to the persons named in the bond as obligees would not, by the express terms of the bond, accrue to them as individuals, but as officers of the municipality. The two persons named are designated as "mayor of the city of Washington" and "marshal of the city of Washington" respectively, and as individuals they have no connection with the matter. This fact clearly distinguishes the case at bar from Hildrup v. Brentano, 16 Ill. App. 443, set out at length in appellants' brief.

Judgment affirmed.

INJUNCTION BONDS — SUITS UPON — RECOVERY OF ATTORNEY'S FEES.—Attorney's fees incurred by the defendant by reason of a preliminary injunction are part of the damages for which he has a right to indemnity, but only such fees as may be incurred after the injunction had been issued, and prior to the determination

of the action can be considered as within the rule; Curtiss v. Bachman, 110 Cal. 433; 52 Am. St. Rep. 111, and note; Bolling v. Tate, 65 Ala. 417; 39 Am. Rep. 5, and note; Behrens v. McKenzie, 23 Iowa, 333; 92 Am. Dec. 428. See monographic note to Trapnall v. McAfee, 77 Am. Dec. 158-160, where the matter is fully discussed.

HASKELL *v.* GALLAGHER.

[20 INDIANA APPEALS, 224.]

MECHANICS' LIENS—OIL-WELL.—A mechanic's or materialman's lien may be had and enforced against an oil-well for labor done and material furnished in drilling such well. Oil-wells are "structures" within the meaning of the mechanic's lien law.

F. H. Snyder, G. W. Bergman, J. Denny, and J. Moran, for the appellants.

J. J. M. La Follette, O. H. Adair, and J. A. M. Adair, for the appellees.

[224] BLACK, J. Demurrers of the appellants for want of sufficient facts to the complaint of one of the appellees and to cross-complaints of the other appellees were overruled. Each of these pleadings showed that the appellants, being tenants under an oil and gas lease of certain land, for the term of five years and as much longer as gas and oil should be found in paying quantities on said land, caused to be erected thereon an oil and gas derrick, and contracted with one Peter Ogle to drill a well for oil or gas where the derrick was located. One of the appellees furnished natural gas to said contractor for fuel with which to run the engine by which power was supplied for drilling the well. All the other appellees performed labor in the drilling of the well under the employment of said contractor.

It was alleged in the complaint and each of the cross-complaints that the well so drilled "is now a [225] producing oil-well, and that the derrick, drive pipe, pumping outfit, boiler, engine and connections, lead and steam pipes are all attached and constitute a part of said oil-well and structure." The pleadings each contained the usual and proper averments for the enforcement of the statutory mechanic's or materialman's lien under a notice thereof exhibited with each pleading; and upon trial of issues formed, the court, in pursuance of its findings, rendered judgment enforcing liens in favor of the appellees upon the leasehold interest of the appellants. The controlling question to be decided is, whether or not a mechanic's or material-

man's lien may be had and enforced for labor done and fuel furnished in drilling an oil-well.

The statute under which the appellees proceeded, section 7255 of Burns' Revised Statutes of 1894, provides that contractors, et cetera, and "all persons performing labor or furnishing material or machinery for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water works, or other structure, may have a lien," et cetera. If the appellees could claim the benefit of this statute, it would seem that it must be upon the ground that an oil-well as described in the pleadings is a "structure" within the meaning of that word in the connection in which it is used in the statute. The term, when applied to a material thing made by human labor, whether considered etymologically or with reference to common usage, or with regard to the words by which it is immediately preceded in the statute, means something composed of parts or portions which have been put together by human exertion.

We are not left to rely upon our own knowledge or common usage as to what is meant and understood by the expression "an oil-well," but the thing to which [226] that name is applied in the pleadings is there described, in language which we have quoted. It consists, when ready for its useful purpose, of much more than the mere hole in the earth, in the drilling of which the appellees performed labor or furnished material. Not only was the oil-well, a portion, the most important portion, of which was made by labor and fuel furnished by the appellees, a structure in the literal sense, but, when it is regarded in connection with the structures specifically named in the statute, it must, we think, be considered as within the legislative intent in the use of the statutory phrase "other structure." For performing labor or furnishing material for the making of any part of such a structure, though it be in the drilling of the hole for the insertion of the tubing through which the oil may flow or may be pumped, a lien may be had under the statute.

In McElwaine v. Hosey, 135 Ind. 481, 492, it was said that the boiler, engine, shafting, beam, derrick, reel, ropes, and drill, when put in place and action, in drilling a gas-well, constitute, not a mill but a structure within the meaning of the statute above mentioned. If such appliances for making a gas-well be a structure, it would seem that a completed oil-well with all its appliances, including the drilled hole in the earth, with its tubing, should also be regarded as within the meaning to which

the language of the statute may legitimately be expanded in its application by the courts.

The judgment is affirmed.

MECHANICS' LIENS—BUILDING OR STRUCTURE—WHAT IS.—The word "building" cannot be held to include every species of erection on land, such as fences, gates, or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, store, church, or shed: See monographic note to La Crosse etc. R. R. Co. v. Vanderpool, 78 Am. Dec. 694. If a structure is of a substantial and permanent character, and may, in any reasonable sense be known as a building, it may be encumbered by a mechanic's lien: Wheeler v. Pierce, 167 Pa. St. 416; 46 Am. St. Rep. 679.

BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY *v.* BRADFORD.

[20 INDIANA APPEALS, 348.]

PARENT AND CHILD—ACTION FOR DEATH.—Under the Indiana statutes, the father has a right to maintain an action to recover for the injury or death of his child.

RAILROAD COMPANIES—LIABILITY FOR DEATH OF CHILD—FAILURE TO FENCE TRACK.—A railway company is not liable in damages for the death of a very young child which has wandered upon its track and is killed by a passing train, merely because it has failed to fence its right of way, as required by statute. Such statute imposes no duty to fence as respects children.

RAILROAD COMPANIES—LIABILITY FOR DEATH OF TRESPASSING CHILD.—Although a child two years old is non sui juris and negligence cannot be predicated upon its own conduct, its tender age does not prevent it from becoming a trespasser upon a railroad track and as such the railway company owes the child no duty, except that if it is discovered in a place of danger the company must use every effort to prevent its injury, and is not liable for the death of such child unless guilty of negligence.

RAILROAD COMPANIES—LIABILITY FOR DEATH OF TRESPASSING CHILD—FAILURE TO GIVE SIGNALS.—A railroad company is not liable for the death of a trespassing child which has wandered upon its track and has been killed by a passing train of cars, merely because it failed to give the statutory signals required at crossings. The object of such signals is to warn persons who have a right to use such crossings or to be upon the track.

RAILROAD COMPANIES—LIABILITY FOR INJURY TO TRESPASSERS—DUTY TO GIVE SIGNALS.—The object of statutes requiring the sounding of a whistle or the ringing of a bell upon the approach of a train at a highway crossing is to warn persons, with vehicles and driving animals, and those having a right to use the highway and crossing. Trespassers cannot complain if the statute is violated.

W. R. Gardiner, C. G. Gardiner, W. R. Gardiner, Jr., and E. W. Strong, for the appellants.

C. K. Tharp and J. McD. Huff, for the appellee.

348 HENLEY, J. Action by the appellee against the appellant, the Baltimore & Ohio Southwestern Railway Company, for damages sustained by appellee by reason of the death of his infant daughter, who was killed by one of appellant's locomotives. The complaint was in two paragraphs. Both paragraphs of 349 complaint were demurred to by appellant. The lower court overruled the demurrers to each paragraph of the complaint, to which ruling of the court appellant excepted, and has assigned such ruling as error to this court. Appellant answered with general denial, and upon the issues thus formed there was a trial by jury. The court instructed the jury in writing. There was a verdict and judgment in favor of appellee for eight hundred and fifty dollars. The appellant moved the court for a new trial, which was overruled, to which ruling appellant excepted and assigns such ruling as error to this court. The record in this case properly presents all the questions argued by appellant's counsel.

It is first contended by appellant that the first paragraph of appellee's complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the demurrer thereto. The statutes of this state give to the father the right to maintain an action for the injury or death of a child: Burns' Rev. Stats. 1894, sec. 267; Horner's Rev. Stats. 1897, p. 266; Pittsburg etc. Ry. Co. v. Vining, 27 Ind. 513; 92 Am. Dec. 269; Mayhew v. Burns, 103 Ind. 328.

The first paragraph of complaint alleges, in substance, that appellee was, on and prior to the eighth day of June, 1895, the father of one Ruth Bradford, who was a healthy, bright, and intelligent child, and at that time two years old; that appellant, a railroad corporation, owned, operated, and ran over its track trains of cars by and through the city of Washington, Daviess county, Indiana; that appellee on said day, together with said Ruth and his wife, were living on a farm which is situated about a mile west of Washington and which adjoins and abuts upon and lies immediately north of appellant's track and right of way; that the house in which appellant lived was situated about one hundred feet from appellant's track, 350 in an open space of ground used by appellee for a yard and garden, and which open space extended from the house down to and along appellant's right of way; that on said day appellant, at about the hour of six o'clock and fifteen minutes P. M., ran an extra train of cars from its shops at Washington to Vincennes, Indiana, and as said train passed by appellee's house it struck said

Ruth, who had wandered upon the track, and killed her; that appellant and his wife at all times vigilantly watched after the comfort and safety of said child, but that on said day, without any fault of appellee or any member of the family, said child escaped from their sight for a few moments and wandered upon the railroad track, and was run over and killed as aforesaid; that, quoting from the complaint, said child was killed on account of the carelessness of appellant in this: "That all the lands along defendant's right of way where the same adjoins and abuts upon the lands occupied by the plaintiff, including the space used by him as his yard and garden, were open, cleared, and in cultivation, and it became and was the duty of the defendant to build, keep, and maintain along the north side of its right of way where the same passes by the plaintiff's house, yard and premises, a fence sufficient and suitable to turn and prevent cattle, horses, mules, sheep, hogs, or other stock from getting on said railroad track; that notwithstanding said duty, and wholly in disregard of the same, the said defendant carelessly and negligently and knowingly suffered and permitted the fence, which had been erected years ago along its right of way by the plaintiff's home and premises, to become old, worn out, and torn down to the ground, so that the same offered no obstruction whatever to any kind of stock or to the plaintiff's child, and the defendant carelessly, negligently, and willfully failed [351] and refused to repair the fence, or to keep and maintain the same in such repair as would be sufficient and suitable to turn and prevent cattle, horses, mules, sheep or other stock from getting on said railroad track at the place where it passes the premises of the plaintiff; that said Ruth escaped from her home and went over and upon the defendant's said railroad track at or about where the defendant had suffered and permitted the fence to become out of repair and torn down to the ground, and was thus run over and killed by the defendant, without any fault or negligence upon his part; that if the fence had been built and maintained as it was the duty of the defendant to do, the said Ruth could not and would not have gone on said track and been killed, as aforesaid; that the said Ruth went on said railroad track, and was killed without any fault or negligence on his part, but solely because of the carelessness and negligence of the defendant in failing and refusing to keep said fence in proper repair, and in suffering and permitting the same to be and remain out of repair and torn down to the ground; that by reason of the defendant's said careless-

ness and negligence, resulting in the death of his child, he has sustained great damage in the loss of the services of the said Ruth, to wit, from the death of the said child until she would have arrived at the age of twenty-one years, amounting to three thousand dollars, and has incurred fifty dollars funeral and burial expenses, all to his damage in the sum of three thousand and fifty dollars, for which he demands judgment and all proper relief."

There can be no doubt as to the theory upon which this paragraph of complaint is drawn. It is predicated upon the theory that appellant was required by law to construct a fence along the line between its right of way and the land of appellee sufficient to turn cattle, horses, mules, sheep, hogs, and other [352] stock; that appellant had not constructed such a fence; that if such fence had been constructed and maintained by appellant along and by appellee's premises, it would have prevented appellee's child from going upon the railroad and thus prevented appellee's injury; that in consequence of the failure to construct and maintain such fence, appellee's child did wander upon the railroad track and was killed by one of appellant's trains. No other negligent act is charged against appellant in this paragraph of complaint, save and except the single act of failing to construct and maintain the fence along its right of way.

The statutes of this state requiring railroads to fence their rights of way is as follows: "That any railroad corporation, lessee, assignee, or receiver, or other person or corporation running, controlling, or operating, or that may hereafter construct, build, run, control, or operate any railroad into or through this state, shall, within twelve months of the day of the taking effect of this act, as to those already completed, and within twelve months from the date of construction and completion of any part of a line or road hereafter constructed, erect, build, construct, and thereafter maintain fences, which may be constructed of barb wire, on both sides of such railroad throughout the entire length, completed within the state of Indiana, sufficient and suitable to turn and prevent cattle, horses, mules, sheep, hogs, or other stock from getting on such road, except at the crossings of public roads and highways, and within such portions of cities and incorporated towns and villages as are or may be hereafter laid out and platted into lots and blocks, and shall also, and in like manner and within the time hereinbefore prescribed, construct, where the same has not already been done, and thereafter maintain at all public [353] road and highway

crossings now existing or hereafter established, barriers, and cattle guards suitable and sufficient to prevent cattle, horses, sheep, hogs, and other stock from getting on such railroad; provided, however, when such fences and cattle guards are not made as herein provided, or when such fence or cattle guards are not kept in repair, such railroad corporation, or person operating the same, shall be liable for all damages which may be done by the agents, employés, engineers, or cars of such corporation or persons operating the same, to any such cattle, horses, sheep, hogs, or other stock thereon; provided, however, that such railroad corporation or other person operating the same shall not be required to fence such railroad track through unimproved and uninclosed lands, and the provisions of this act shall not apply to such parts and portions of any such railroad which runs through unimproved and uninclosed lands, but when such lands become improved and inclosed on three sides, the same shall apply, and such railroad corporation or person operating the same shall be required to fence the same under the provisions of this act within six months from the date of such inclosure": Burns' Rev. Stats. 1894, sec. 5323; Horner's Rev. Stats. 1897, p. 4098 a.

This court is of the opinion that the injury herein complained of is foreign to the object of the legislative order above referred to, and that there could be no recovery under the first paragraph of appellee's complaint; that the statute imposes no duty to fence as respects children and has no application to a case like the one now before us. It is in many respects similar to the case of Gorris v. Scott, L. R. 9 Ex. 125. The last-named case was a suit instituted by the owner of some sheep to recover from a shipowner for the loss of the sheep by reason of their being [354] washed overboard on account of the neglect of the shipowner to comply with the orders of the privy council, made pursuant to parliamentary authority, which orders compelled shipowners to dispose of domestic animals on shipboard in a certain way therein set out. The object of these requirements as to shipment was to prevent unnecessary suffering to the animals, and to prevent the spread and communication of diseases among them. It was held by the court that the injury complained of was foreign to the object of the legislative order referred to, and a recovery was denied, although it was admitted that, had the law been complied with as to the disposition of the animals, they would not have been washed overboard, and the owner of the stock would not have suffered the injury complained of.

This principle is fully discussed in the well-considered case of Hall v. Brown, 54 N. H. 495. The supreme court of this state have held that the act of April 13, 1885 (section 5323, supra), did not repeal the act of 1863 (section 4025, et seq., of the Revised Statutes of 1881). The title of the act of 1863 is, "An act to provide compensation to the owners of animals killed or injured by cars, locomotives, or other carriages of any railroad company in this state, and to enforce the collection of judgments rendered on account of the same." One section of the act provides that the act shall not apply to any railroad that may be securely fenced and the fences properly maintained. The act of 1885 provides that the railroads shall be fenced, if not by the companies, corporations, or persons operating them, then by the landowner through whose land the road passes, under certain conditions in the statute set forth. The liability of the company failing to perform all the acts required by this law is determined by the act itself. It is provided therein that when the fences, such as are described [355] in the act, are not made as therein provided, or when such fences or cattle guards are not kept in repair, the railroad corporation or person or company operating the same shall be liable for all damages done by the agents, employés, engines, or cars of such corporation to any such cattle, hogs, sheep, horses, or other stock thereon.

Our statutes upon the subject of fencing railroad rights of way are plain, and the mischief to be remedied thereby is fully and completely set out. What manner of a fence could a body of law-makers describe which would be sufficient to prevent children from going upon the right of way of a railroad company? Certainly no fence which would be sufficient to turn horses, cattle, sheep, and hogs, as is specified by our law, would offer much of an obstacle to the ordinary boy four years old and upward, who might conclude, in the absence of parental care, to climb over it. This court will take judicial notice that the child two years old is non sui juris, and that, therefore, negligence will not be predicated upon its own conduct, but its tender age will not prevent it from becoming a trespasser (see Rodgers v. Lees, 140 Pa. St. 475; 23 Am. St. Rep. 250), and as a trespasser the appellant owed no duty to it, except that if the child was discovered on appellant's premises in a place of danger to use every effort to prevent its injury: Pennsylvania Co. v. Meyers, 136 Ind. 242; Wabash R. R. Co. v. Jones, 163 Ill. 167.

This brings us to the consideration of the second paragraph of complaint, wherein, after repeating the allegations of the

first paragraph of complaint, appellant's negligence is stated in substance as follows:"That it was the duty of appellant, in running its trains, and when the same was not less than eighty or more than one hundred rods from the public highway crossing, to sound the whistle on the engine three [356] times distinctly, and to ring the bell on said engine continually until the train passed the crossing; that the engineer on appellant's train failed, neglected, and omitted to sound the whistle when the said train was eighty to one hundred rods from said crossing, or at any time, until said train was in the act of striking said child, and failed and neglected at any time to ring the bell on approaching said crossing, and failed and neglected to keep a proper lookout in front of said engine as the said engine approached the crossing. The second paragraph then continues as follows: "That by reason of defendant's neglect to sound the whistle three times distinctly when said engine was between eighty and one hundred rods from said highway crossing, and ring the bell continuously, neither the said child nor the plaintiff had any notice or warning of the approach of the train until it had got to a point opposite plaintiff's home; that had said whistle been sounded, as it was the defendant's duty to do, when the same was eighty rods distant from said highway crossing, plaintiff's immediate attention, as it was his custom, on hearing the whistle of the engine, to look out for the child, would have been drawn to the perilous position of said child in time for him to get to it and rescue it; that had said engineer kept a careful and vigilant lookout on said railroad track in front of his engine, he could have discovered said child on said track in time to check and slow said engine up and stop the same before it struck the child. Plaintiff says that because of all the concurrent acts of negligence aforesaid, to wit, to fence said track, to sound the whistle and ring the bell so as to warn plaintiff of the approach of said train, and to keep a lookout and discover said child and slow up the train so as to give plaintiff time to [357] rescue said child, the said child was run over and killed by defendant."

It is not contended that appellee's child was not a trespasser upon appellant's track and right of way, and it is not alleged that appellant's engineer saw the child upon the track in time to have checked the train and avoided the injury. Then the injury could not have been willfully inflicted; neither was the act negligently done, because appellant, not seeing the trespassing child, owed no duty to it. If the train had been thrown

from the track by reason of striking a trespasser, and an injured passenger thereon had brought suit against the railroad company, alleging the negligence of the company in that the engineer failed properly to observe the track and keep a lookout ahead for obstructions of any kind, or if the engineer had seen the child upon the track, and after seeing it had failed and neglected to use every means in his power to avert the disaster, then an entirely different case would be presented. The only other act of negligence charged in the second paragraph of appellee's complaint is appellant's failure to give the statutory signals at the crossing near where appellee's child was killed. There is no averment in the complaint that appellant's failure to give the statutory signals for the crossing contributed to the death of the child, except that it is alleged that if the whistle had been sounded and the bell rung, as is provided by the statute, appellee could have known of the approach of the train in time to find the child and rescue it.

The statute of this state in regard to signals to be given at crossings is as follows: "It shall be the duty of all railroad companies operating in this state to have attached to each and every locomotive engine a whistle and a bell, such as are now in use or may be hereafter used by all well-managed railroad companies, [358] and the engineer or other person in charge of or operating such engine upon the line of any such railroad shall, when such engine approaches the crossing of any turnpike or other public highway in this state, and when such engine is not less than eighty nor more than one hundred rods from such crossing, sound the whistle on such engine distinctly three times and ring the bell attached to such engine continuously from the time of sounding such whistle until such engine shall have fully passed such crossing; provided, et cetera": Burns' Rev. Stats. 1894, sec. 5307; Acts 1881, p. 590.

We think the statute was intended solely for the protection of persons who might be upon or approaching crossings, or of animals being driven along the highway, and has no reference to a case like this. Here was a child, a trespasser upon appellant's right of way, not upon the highway or the crossing, but a considerable distance from the highway crossing, and had not been upon the crossing, but had come upon the right of way as a trespasser from the very first. It is not alleged that anyone in charge of the train saw the child, but the allegation is, that had the statutory signals been given for the crossing, the father of the child could have been warned that the train was ap-

proaching, and could then have searched for the child, and, if found on appellant's track, could have rescued her before any injury was done. The case of Metallic Compression Co. v. Fitchburg R. R. Co., 109 Mass. 277, 12 Am. Rep. 689, was an action brought against a railroad corporation for damages for negligently severing a hose which was laid across the track in the town of Summerville, thereby cutting off the supply of water from a fire which was consuming plaintiff's factory, whereby the building and its contents were destroyed. It was said in that case: "One [359] of the grounds taken by the plaintiff is, that the defendant's train did not stop before crossing the Grand Junction Railroad, and thereby violated the General Statutes, chapter 63, section 93, which require that trains shall be stopped before crossing another railroad at grade. The point of the crossing was in sight of the fire, and a few hundred feet west of it. But the object of the statute was solely to prevent the collision of trains at crossings, and had no reference to the extinguishing of fires. It is not applicable to this case." And so the object of the statutory provision in this state requiring the sounding of the whistle and the ringing of the bell upon the approach of a train at a highway crossing is to warn "persons with vehicles and driving animals," they having a perfect right to use the highway and crossing, and it is presumed that if the signals are given they will avoid the danger. Trespassers cannot complain that the statute was violated: Louisville etc. Ry. Co. v. Green, 120 Ind. 367; Ivens v. Cincinnati etc. Ry. Co., 103 Ind. 27; Toomey v. Southern Pac. R. R. Co., 86 Cal. 374; Louisville etc. Ry. Co. v. Howard, 82 Ky. 212.

For the reasons above stated, we are of the opinion that the second paragraph of complaint did not state a cause of action, and the lower court erred in overruling the demurrer addressed thereto. Cause reversed, with instructions to the lower court to sustain the demurrer to both paragraphs of the complaint.

RAILROAD COMPANIES—STATUTORY DUTY TO FENCE—INJURY TO CHILD.—A statute requiring a railway company to fence its road and to maintain such fence and providing that "it shall hereafter be liable for all damages sustained by any person in consequence of its failure or neglect to fence," imposes an absolute duty on the company to fence, and is not a mere fence law for animals, but is also a police regulation designed for the benefit of the public, and under it the company is liable for injury inflicted by its train upon a young child who, being non sui juris, strays upon the track and is injured in consequence of the failure of the company to fence its road: Rosse v. St. Paul etc. Ry. Co., 68 Minn. 216; 64 Am. St. Rep. 472, and note citing conflicting cases. Compare Terre Haute etc. Ry. Co. v. Williams, 172 Ill. 379; 64 Am. St. Rep. 44, and note.

RAILROAD COMPANIES—DUTY TOWARD TRESPASSERS UPON TRACK—CHILDREN.—A railroad corporation owes, with respect to children of tender years and immature judgment, at least the duty which it owes to domestic animals straying upon its track, to wit, the duty of keeping a reasonable lookout to discover whether they are on the track, as well as to avoid injury to them after they are seen: Gunn v. Ohio River R. R. Co., 36 W. Va. 165; 32 Am. St. Rep. 842, and note. See Bottoms v. Seaboard etc. R. R. Co., 114 N. C. 699; 41 Am. St. Rep. 799. An engineer in charge of a railroad train is not bound to exercise any care for the safety of children trespassing on the track until he actually sees them. After he discovers them, he is bound to assume that they will remain, and must then exercise the highest degree of care to avoid injuring them: Burg v. Chicago etc. Ry. Co., 90 Iowa, 106; 48 Am. St. Rep. 419, and note. See monographic note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 421-423.

STATE v. BERGNER.

[20 INDIANA APPEALS, 390.]

MORTGAGES—SALE OF MORTGAGED CHATTELS ON EXECUTION—LIABILITY OF OFFICER.—An officer who sells mortgaged chattels under an execution issued in an attachment suit against the mortgagor, and delivers possession to the purchaser without requiring him to comply with the terms of the mortgage, is liable only for nominal damages, if the property sold remains within a short distance of where the mortgagee lives, and it is not injured, nor its value as security impaired.

Ibach & Ibach, for the appellant.

F. N. Gavit and T. S. Fancher, for the appellees.

391 ROBINSON, J. There is in this record but one question, the solution of which depends upon the law applicable to the following facts: In April, 1890, it appears appellee, Bergner, duly qualified as a constable, with his coappellees as sureties on his bond; that he regularly appointed William Emmel his deputy, and at the times hereinafter mentioned said Emmel was a duly qualified and acting deputy constable; that in March, 1893, one William Burnett was indebted by notes to the relator, and to secure the same executed a chattel mortgage, which was recorded as the statute provides; that under the conditions of the mortgage the mortgagor was to retain possession of the mortgaged property until the notes became due or until the mortgagee felt himself insecure, or, if the property should be levied upon by virtue of an execution or any writ from any court, then the mortgagee should have the right to take immediate and unconditional possession of the same for his own use; that on the twenty-seventh day of October, 1893, one Au-

gust Wuestenfeld commenced suit against said Burnett before a justice of the peace, and filed his affidavit and bond in attachment; that a writ of attachment was issued, and on said day said Emmel levied the same on the property described in the mortgage, and took the same into his possession, and removed it from the place where Burnett had it stored; on January 5, 1894, judgment was rendered against Burnett in favor of Wuestenfeld for fifty-one dollars and sixty-five cents and costs, and the attached property ordered sold, the same being the said mortgaged property; on the thirty-first day of January Emmel sold the property to divers persons, all of whom were to the relator unknown, and delivered to the purchasers said property without complying with the terms of said mortgage; that on January 10th relator informed Emmel that he had a chattel mortgage on said property, [302] and from thence forward the mortgagee knew that the constable had all of said property unsold and in his possession under levy; that when said property was levied on the mortgage became entirely due and payable; that said Emmel did not sell said property in gross to one person, but article by article, to various persons who lived in the same county with the relator, and all within one quarter to one mile from where relator lived, and with one or two exceptions all lived at the same places when this suit was brought; that the relator at no time knew to whom said Emmel delivered said property except some chairs valued at three dollars; that relator knew of the day, when, and time and place where, said sale was to be held; that on the day of the sale said property was worth seventy-five dollars, and there was due and unpaid on said notes secured by the mortgage one hundred and sixty dollars, which is still due relator; that the purchase money on said sale was applied on said judgment.

The court stated as conclusions of law that by delivering said property to the purchasers without requiring them to comply with the mortgage, appellee, Bergner, committed a breach of his official bond, that as a result of such wrongful acts of Bergner the relator sustained damages in the sum of one cent, and that relator should recover of appellees one cent damages and one cent costs.

Section 734 of Burns' Revised Statutes of 1894 provides that: "Goods and chattels pledged, assigned, or mortgaged as security for any debt or contract may be levied upon, and sold on execution against the person making the pledge, assignment, or mortgage, subject thereto, and the purchaser shall be entitled

to the possession, upon complying with the conditions of the pledge, assignment, or mortgage." Under this statute the officer is entitled to the possession of the property mortgaged [393] as against both the mortgagor and mortgagee for the purpose of selling it on an execution: Landers v. George, 49 Ind. 309; Olds v. Andrews, 66 Ind. 147; Sparks v. Compton, 70 Ind. 393.

The record of the mortgage was notice to the officer that there was a lien on the property of the attachment debtor prior to the lien of his writ. He must be held to have known that a liability had accrued to the relator under the terms of the mortgage, and that the relator had the primary right to possession of the property. He had nothing to do with the validity of the mortgage but to treat it as a valid lien. He had the right to the possession of the property, and had the right to sell it, but he could not give the purchasers possession of the property until the terms of the mortgage had been complied with, because the statute expressly forbids him to do so. He did sell it, and gave the purchasers possession, but failed to require the purchaser to comply with the conditions of the mortgage, and for this breach of duty he became liable on his bond.

But upon the facts the trial court was right in assessing damages in a nominal sum only. It cannot be presumed that the property, simply by delivering its possession to the purchasers, was necessarily materially injured, or that its value as a security for the mortgage debt had been diminished. The burden was on the relator to show such facts as would entitle him to substantial damages. There is no finding that shows that the property was injured, or that its value as a security has been impaired, but, on the other hand, the finding shows that after the sale, and when this suit was brought, the property was still within the county, and within a short distance of where relator lived. As soon as the levy was made, the relator, under the mortgage, had the right to the immediate possession [394] of the property. For about three weeks before the sale he knew that the levy had been made, and that the property was in the possession of the officer. For some reason he did not take possession, but permitted the property to be sold. The sale did not divest his lien, and, for aught that appears, the property was as valuable as a security for his debt after the sale as it was before. He does not show that his security had been lost by the acts of the officer, or that its value has been necessarily diminished.

In the case of Collins v. State, 3 Ind. App. 542, 50 Am. St.

Rep. 298, cited by counsel, it appeared that the officer had sold the mortgaged goods and delivered them to the purchasers, who immediately took the same out of the county and converted them to their own use, and that they became wholly lost to the mortgagees, and the officer was held liable on his bond for more than nominal damages. But the facts clearly distinguish that case from the case at bar.

In the case of Slifer v. State, 114 Ind. 291, a constable sold mortgaged chattels and delivered possession to the purchasers without the conditions of the mortgage having been complied with. It does not appear whether the purchasers took the goods away, nor is there anything to show what was done with them. The court held that as the finding failed to show the value of the property, and nothing being found to indicate that the property had been materially injured or that its value as a security for the mortgage debt had been diminished by its delivery to the purchasers, a case was not made for more than nominal damages: See, also, McDaniel v. State, 118 Ind. 239.

Judgment affirmed.

EXECUTION—LEVY UPON MORTGAGED PERSONALTY—DUTY AND LIABILITY OF OFFICER.—An officer levying upon mortgaged personal property and selling it upon an execution, the lien of which is junior to the mortgage, must hold it until the terms of the mortgage have been complied with by the purchaser, and, if he fails to do so, he is liable on his official bond for any damage sustained by the mortgagee: Collins v. State, 3 Ind. App. 542; 50 Am. St. Rep. 298, and note.

INDIANA, ILLINOIS AND IOWA RAILWAY COMPANY v. DOREMEYER.

[20 INDIANA APPEALS, 605.]

PRACTICE.—EXCEPTIONS TO CONCLUSIONS OF LAW upon a special finding of facts admit the truth of the facts found.

CARRIERS—LIABILITY FOR GOODS SEIZED UNDER LEGAL PROCESS.—A common carrier is excused from liability for not carrying and delivering goods, seized while in his hands by virtue of legal process, and taken out of his possession without any act, fault, or connivance on his part.

T. S. Fancher, for the appellant.

W. C. McMahan, for the appellee.

605 HENLEY, J. This action was commenced by the appellee against the appellant as a common carrier for damages sustained by the appellee on account of the failure of the appellant

to transport safely and deliver certain household goods and wearing apparel, the property of the appellee. The complaint is in substance as follows: That on the twenty-eighth day of November, 1896, the defendant (the appellant), was a common carrier of goods for hire from Dwight, Illinois, to Lowell, Indiana, and on said day, at Dwight, Illinois, by its agent, then and there in writing agreed, in consideration of the sum of four dollars and forty-five cents then and there to be paid by appellee to said agent, to carry safely and promptly for appellee and to deliver to her at Lowell, Indiana, certain household goods and clothing, a copy of which said agreement is filed with the complaint and made a part thereof, and that the plaintiff then and there delivered to the appellant for that purpose the certain goods aforesaid; that appellant did not safely carry and deliver said goods as aforesaid, but GOG failed to do so, by which reason the appellee was deprived of the use of any of said goods for a long time, to wit, more than thirty days, and whereby certain of said goods and clothing so owned by appellee, and described in the bill of particulars filed with and made a part of the complaint, were wholly lost, and that she was put to great inconvenience in her living and comfort and damaged in the sum of two hundred dollars.

To this complaint appellant answered in two paragraphs. The first paragraph was a general denial. The second paragraph of answer admits that on or about the middle of September, 1896, appellee's husband shipped his household goods, furniture, and wearing apparel from the state of Idiana, to the town of Dwight, state of Illinois, and that on or about the twenty-sixth day of November, 1896, the appellee's husband caused said goods to be reshipped from said town of Dwight to Lowell, Indiana, over appellant's road, but appellant says that shortly after said goods were delivered at appellant's freight depot at Dwight, and after the same had been loaded into the car, a creditor of appellee's husband caused said property to be attached in said town by a writ duly issued by a duly authorized court of said state. A copy of the complaint, affidavit, bond, notice, and writ is attached to and made a part of the answer, together with a certified copy of the judgment in said court. It is further averred that the officer so serving said writ took possession of all of said property, and kept and retained possession thereof, and prevented the appellant from shipping said goods, as appellant otherwise would have done had said writ not been served and said goods attached. It is further averred that the appel-

lant could not ship said goods because the officer having full control of said goods refused to permit the defendant to ship the same to said appellee, and that as [607] soon as said goods were attached and taken into the custody of said officer, appellant notified the appellee and her husband that said property had been so attached, and fully informed said appellee and her husband of the nature of said process by which shipment of said goods was prevented, and that, if appellee sustained any injury or damage to herself or goods, it was while they were in the custody of the officer and while attached at Dwight, Illinois. Appellant further avers that when said goods were delivered at appellant's freight depot, in the town of Dwight, that said goods were duly consigned to the appellee, and a bill of lading duly issued by it to the consignee, the appellee herein, and that said goods were detained at the said town of Dwight without any fault or negligence on the part of this appellant or by any of its agents, servants, or employés, and that as soon as said property so attached was released, this appellant shipped said goods to the consignee, the appellee herein.

The appellee replied to the second paragraph of appellant's answer denying each and every material allegation therein set forth. Upon the issues thus formed there was a trial by the court, and at the request of appellant, the court made a special finding of facts which was in the following words: "The court having been requested by both the plaintiff and defendant in the above-entitled cause to make a special finding herein, together with its conclusions of law thereon, finds the facts as follows: That plaintiff commenced this action to recover from the defendant, by way of damages for loss of certain goods described in a bill of particulars filed with her complaint, which goods were to be shipped by her husband for her from Dwight, in the state of Illinois, over the defendant's railroad to Lowell, Indiana; that [608] said goods were delivered at the office of the defendant in the town of Dwight, and a bill of lading issued by the defendant's agent to Mrs. N. E. Doremeyer, the plaintiff, to be shipped to her at Lowell, Indiana; that said bill of lading was issued on the twenty-eighth day of November, 1896; that on receipt of the said goods by the defendant, the same were immediately placed in one of defendant's cars, to be shipped to their destination as required by said bill of lading; that on the twenty-ninth day of November, 1896, while said goods were in the defendant's car at Dwight, one Thomas Jenkins, a constable of said town of Dwight, caused said goods to be at-

tached by virtue of a writ of attachment duly issued from a justice court in an action begun by one Jane Burhan against Frank Doremeyer, the husband of the plaintiff herein; that immediately before the levy, the officer armed with said writ, but which he did not exhibit, asked defendant's said agent if he had any goods in his possession belonging to Doremeyer; that in response thereto the agent answered that he had, and stated that the goods were then in the car; that without anything further transpiring, and without objection upon the part of the agent, the officer seized and levied on said goods. The court further finds that the plaintiff's husband shipped a lot of household goods to Dwight, Illinois, from Lowell, Indiana, during the months of September, 1896; that said goods were billed from Lowell to Dwight in September, 1896; that said Frank Doremeyer was then the consignee and consignor of said household goods; that when he delivered the goods to the agent at Dwight, in November, 1896, to be reshipped to Lowell, Indiana, he informed the agent that they were the same household goods that he shipped there from Lowell, Indiana, in September of the same year, and claimed that they were shipped there from Lowell to 600 Dwight at much less expense than the agent was then demanding that he now pay to return them to Lowell, Indiana; that at the time of the consignment by plaintiff, as aforesaid, and ever since, the goods so consigned were the sole and exclusive property of plaintiff; that the officer attached the said household goods and removed them from defendant's car and stored them in defendant's freight office, and from that time said constable exercised complete control over them, until a portion of them were rebilled on the 21st of December, 1896; that the officer had stored said goods in the freight building, and while he had them in his custody and under his control by virtue of the attachment or writ, the building in which they were stored was burglarized on the evening of the tenth day of December, 1896; that the boxes and barrels in which they were stored were broken open and a portion of the goods stolen therefrom; that said goods, at the time they were stolen, were in the custody and under the control of the said constable, by virtue of the writ in attachment. The court further finds that when said goods were delivered to defendant by Frank Doremeyer for shipment to Lowell, Indiana, he claimed to be acting as the agent of the plaintiff; that as soon as said goods had been delivered to defendant for shipment, the plaintiff, with her husband, took a train for Chicago; that said goods were attached

by said constable the following day, and after said plaintiff and her husband had left said town of Dwight; that said plaintiff was informed by defendant on the third day of December, 1896, and after she reached Lowell, Indiana, and had taken up her residence there, that said goods had been attached and was then in the custody of an officer, by virtue of a writ in attachment duly issued by a justice of the peace in [610] which the plaintiff in said attachment suit claimed that Frank Doremeyer owed her nineteen dollars for milk and house rent; that the said defendant herein requested the said Doremeyers to deposit the amount of said claim with the agent at Lowell, Indiana, and the goods would be released and forwarded at once to them; that the plaintiff and her husband informed this defendant that said goods were not those of the said Frank Doremeyer, but were those of his wife, and they refused to deposit said money or pay said claim or do anything to secure the release of the household goods, but permitted them to remain in the freight office in the custody of said constable for several days thereafter, and until the burglary occurred, and until the day of trial, to wit, the twenty-first day of December, 1896, when said plaintiff herein and her husband filed in said justice court at Dwight, Illinois, a verified schedule, claiming the property as belonging to them both, and the court finds that the said property was then and there released from said attachment proceedings, and, except as to that portion of it which had been stolen, rebilled by the defendant herein and transported to plaintiff, at Lowell, Indiana; that the goods so stolen were wholly lost to the plaintiff, and that the goods so stolen were of the fair cash value, at the time of taking by thieves, and at the time they should have been delivered at Lowell, Indiana, had not said levy been made, of seventy-six dollars; that at the time of the receipt of said goods by defendant, it was a common carrier for hire, and received them as such, and that the defendant's charges therefor were wholly prepaid; that the bill of lading executed by defendant to plaintiff was in the words and figures set out in the exhibit to the complaint." On the special finding of facts as above, the court stated its conclusions [611] of law to be that appellee is entitled to recover from the appellant the sum of seventy-six dollars.

The only error argued by appellant, and which is presented by the record in this cause, is that the court erred in its conclusions of law on the special findings. Appellant, having excepted to the conclusions of law upon the special finding of

facts, admits the truth of the facts as found by the court. We believe it to be the settled law in this state that a seizure under legal process will excuse the common carrier from delivering goods intrusted to his care for shipment: Ohio etc. Ry. Co. v. Yohe, 51 Ind. 181; 19 Am. Rep. 727. The case last cited covers every point in controversy in this cause, and while the facts are somewhat different in the two cases, the governing principle of law is the same in both cases.

In the case of Stiles v. Davis, 1 Black, 101, the goods were seized by a sheriff under a writ of attachment against a third party, and taken from the carrier, and the action was brought by the consignee upon the bill of lading, as in this case. In the opinion the supreme court of the United States say: "After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed by them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the [612] goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 290, 350, and 453 of Drake on Attachments, second edition."

It was said by Downey, J., in delivering the opinion of the supreme court of Indiana, in the case of Ohio etc. Ry. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727: "The question presented is this, Is a common carrier of goods excused from liability for not carrying and delivering the goods, when they are, without any act, fault, or connivance on his part, seized, by virtue of legal process, and taken out of his possession? It is impossible for the carrier to deliver the goods to the consignee, when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when goods are offered him for carriage, to investigate the question as to their ownership. Nor

do we think he is bound, when the goods are so taken out of his possession, to follow them up,and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process. After the seizure of the goods by the officers, by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of the law. The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully [613] seized, the plaintiffs had their remedy against the officer who seized them, or against the party at whose instance it was done. As between these parties, the process would be no justification, if the plaintiffs were the owners and entitled to the possession of the goods. It makes no difference, we think, that the process was issued by a tribunal of a state different from that in which plaintiffs reside. The rule must be the same as in a case where the process emanates from a court in the state of the plaintiff's residence. It cannot be denied that the carrier must obey the laws of the several states in which it follows its calling. The laws of Illinois which give force and effect to a writ of replevin must be obeyed. It cannot say to the sheriff, who is armed with a writ issued in due form of law commanding him to take the property, that it has executed a bill of lading, and thereby agreed to transport the property to another state, and therefore he cannot have it. The sheriff would have the right, and it would become his duty, to call out the power of the county to aid in serving his lawful process. The carrier is deprived of the possession of the property by a superior power—the power of the state—the vis major of the civil law, and in all things as potent and empowering, as far as the carrier is concerned, as if it were the 'act of God or the public enemy.' In fact, it amounts to the same thing; the carrier is equally powerless in the grasp of either."

In the case at bar it is found by the court that on the twenty-ninth day of November, 1896, while the said appellee's goods were in appellant's care, ready for shipment, they were attached, seized, and levied upon by virtue of a writ of attachment duly issued from a justice's court, and that from the time they were thus seized by the constable up to the time the goods

were reshipped and including the time in which a part of [G14] the goods were stolen, they were under the care and control of the said officer of the court; that appellee, on the third day of December, 1896, which was the fourth day following the attachment of the goods, received notice from the appellant at Lowell, Indiana, the place to which she had removed, that the goods were attached, and were in the custody of the officer. It does not appear from the special finding that the goods of appellee were so seized by virtue of legal process by reason of any act, fault, or connivance of the appellant, and the case comes squarely within the rules of law laid down by our supreme court in Ohio etc. Ry. Co. v. Yohe, 51 Ind. 181; 19 Am. Rep. 727.

The lower court erred in its conclusions of law upon the special finding of facts. The cause is for such reason reversed, with instructions to the lower court to restate its conclusions of law and render judgment in favor of appellant.

Comstock and Black, JJ., absent.

CARRIERS—EXEMPTION FROM LIABILITY FOR NONDELIVERY—SEIZURE UNDER PROCESS.—The exemption of a carrier from liability for the nondelivery of goods caused by the act or mandate of public authority extends to those cases in which the goods are taken from his possession by legal process against the owner. But, in order to protect the carrier in such cases, it is necessary that the seizure be made without the procurement or connivance of the carrier; that the proceeding or process under which it was made was valid, and that the carrier gave prompt notice thereof to the owner: Railroad Co. v. O'Donnell, 49 Ohio St. 489; 34 Am. St. Rep. 579, and note. See monographic note to Kohn v. Richmond etc. R. R. Co., 34 Am. St. Rep. 735, 736.

SPENCER *v.* MCLEAN.

[20 INDIANA APPEALS, 626.]

CONTRACTS—CONSIDERATION.—A promise made to a person to induce him to perform an act which he is already bound in law to perform is without consideration and is not binding.

BONDS—LIABILITY CREATED BY.—If the stockholders in a corporation execute a bond to secure the directors thereof as sureties of the corporation and the bond is conditioned that any liability incurred shall be in proportion that the amount of stock held by each obligor bears to the whole amount of stock, the liability created is several and not joint.

APPELLATE PRACTICE—REVERSIBLE ERROR IS NOT COMMITTED in sustaining an objection to a competent question, when the same witness afterward answers substantially the same question.

BONDS—QUESTION FOR JURY.—Whether there was an agreement that a bond should not be delivered until signed by others is a question for the jury, when the evidence is in conflict.

BONDS—SURETIES, SIGNING BY—DELIVERY.—If a surety signs a bond on condition that it is not to be delivered until others named therein shall sign it, delivery of the bond without their signatures releases such surety.

BONDS—SURETYSHIP.—A bond conditioned to pay to the obligees upon a fixed basis, a certain share of any indebtedness they might have to pay as sureties is an original promise and not a collateral undertaking of suretyship or guaranty.

TRIAL.—INSTRUCTIONS REQUESTED BUT FULLY COVERED by those already given are properly refused.

A. M. Reynolds and A. K. Sills, for the appellant.

Sellers & Uhl, for the appellees.

626 ROBINSON, J. It appears that appellant owned five shares of fifty dollars each of the capital stock of the Tippecanoe Canning Company, a corporation with ten thousand dollars capital stock; that said capital stock was invested in real estate, a building and machinery; that in February, 1894, appellees were elected directors of said corporation, and entered upon the duties of their trust; that to carry on the business, it became necessary to borrow large sums of money; that on the second day of 627 October, 1893, said corporation executed a note, with appellees as sureties, to Alice Brearley in the sum of two thousand dollars, and on the twenty-sixth day of December, 1894, appellees became sureties on the corporation's note to Shirk & McLean in the sum of fifteen thousand dollars; that on March 4, 1896, after said notes became due, appellees paid nine thousand dollars on the Shirk & McLean note and one thousand dollars on the Brearley note.

On the twentieth day of April, 1893, appellant, together with a large number of other persons, executed to appellees a bond conditioned that whereas the obligors were stockholders in said corporation, that in the management of the business for 1893 it would be necessary to borrow money from time to time; that appellees had agreed to become surety for such loans, and providing that if such loans should be paid at maturity, and appellees held harmless, the obligation was to be void, otherwise to remain in full force. It was further provided that any liability incurred by reason of the bond should be in proportion to the amount of stock held by each of the obligors at the time of incurring such liability; that the liability should be several and not joint, and no recovery had against any obligor for a sum greater than his share thereof, in proportion as the amount of stock in said corporation held by him at the date of the incurring of such liability bears to the whole amount of stock then

issued. On April 2, 1894, a similar bond was executed for money borrowed for the business of 1894, and containing in addition to the conditions of the bond of April 20, 1893, the further provision that each of the obligors agreed to pay his said share with attorney's fees and without relief from valuation and appraisement laws.

Under the bonds, appellant would not be liable for any money paid by appellees by reason of their suretyship, [628] on notes executed prior to the execution of either bond. It is well settled that a promise made to a person to induce him to perform an act which he is already bound in law to perform is without consideration, and is not binding on the promisor: Smith v. Boruff, 75 Ind. 412; Fensler v. Prather, 43 Ind. 119.

The bond of April 20, 1893, was executed prior to the execution of the Brearley note, and the complaint alleges that appellees became sureties for such loan in consideration of such bond, and on the faith and credit of appellant's promise therein contained. And the bond of April 2, 1894, was executed prior to the Shirk and McLean loan, and it is alleged that appellees became sureties for said loan on the faith and credit of said bond. It cannot be said that the complaint seeks to recover any money paid out as such sureties on loans made prior to the execution of the bonds. The bonds expressly provide that they are several obligations, and not joint. When appellant signed the bond, he incurred a liability in proportion to the amount paid by appellees as the stock then owned by him bore to the whole capital stock. Whether one or more other persons signed the bonds neither diminished nor increased appellant's liability. Appellant's contract was neither a contract of suretyship, nor one of guaranty, and the rule applicable is clearly distinguishable from that declared in Markland Min. etc. Co. v. Kimmel, 87 Ind. 560. See Deardorff v. Foresman, 24 Ind. 481; Madison etc. Co. v. Stevens, 10 Ind. 1; Hunt v. State, 53 Ind. 321; Whitcomb v. Miller, 90 Ind. 384.

No reversible error is committed in sustaining an objection to a competent question, if the same witness afterward answers substantially the same question: Norris v. Norris, 3 Ind. App. 500; Toledo etc. R. R. Co. v. Milligan, 2 Ind. App. 578.

[629] Whether there was an agreement when appellant signed the bond that it was not to be delivered until all the stockholders had signed it was submitted to the jury under proper instructions. The evidence is conflicting as to whether there was such an agreement, and, under a proper instruction, the court left

the question with the jury. It is not to be denied that if appellant signed the bond upon the agreement and condition that it was not to be delivered until the others named in the body of the bond had signed it, and it was in fact delivered without their signatures, appellant would not be liable: Markland etc. Co. v. Kimmel, 87 Ind. 560. But whether there was such an agreement was for the jury to say from all the evidence.

The obligors in the bonds in question did not guarantee the payment of the debts contracted by the appellees. Nor were they sureties for appellees. The undertaking is between appellant and appellees, to pay to appellees, upon a fixed basis, a certain share of any indebtedness appellees might have to pay as sureties for the corporation. It was distinctly an original promise, and not a collateral undertaking of suretyship or guaranty: Anderson v. Spence, 72 Ind. 315; 37 Am. Rep. 162. See, also, Frash v. Polk, 67 Ind. 55; Horn v. Bray, 51 Ind. 555; 19 Am. Rep. 742; Board etc. v. Cincinnati etc. Co., 128 Ind. 240. Appellant's liability on the bond attached as soon as appellees paid the debts for which they were sureties. Appellant agreed to pay a certain amount, and also attorney's fees. The promise to pay attorney's fees is an unconditional promise, and is, in effect, not unlike the ordinary attorney fee clause in a promissory note.

In its fifth instruction, the court told the jury: "If you find from the evidence that when the defendant signed the instruments sued on, that it was the agreement [630] and intention that all the stockholders of said Tippecanoe Canning Company should sign them before they should be delivered, and that they were delivered, and taken possession of by plaintiffs, without the consent of defendant and without all the stockholders of said company signing them, you should find for the defendant." This instruction fully covers the third instruction requested by appellant.

The eighteenth and nineteenth instructions requested by appellant, and refused, were to the effect that if, after the notes on which appellees were sureties became due, they had money in their hands of the company sufficient to pay said notes, it was their duty to apply such money on such debts, and if they did not, the finding should be for the defendant. This was fully stated in the eighteenth instruction given by the court.

We have carefully examined the instructions given by the court, and can but conclude that they fully cover all the instructions requested by appellant which were refused, and of which complaint is made by counsel.

Judgment affirmed.

CONTRACTS—INSUFFICIENT CONSIDERATION.—A promise by a party to do what he is legally bound to do is an insufficient but not illegal consideration. It is the same as no consideration at all, and is merely void: Cobb v. Cowdery, 40 Vt. 25; 94 Am. Dec. 370; Performance by a party of an act which he was legally bound to perform is not a sufficient consideration to support a promise to pay for the performance of such act: Keith v. Miles, 39 Miss. 442; 77 Am. Dec. 685, and note.

SURETYSHIP—EXECUTION OF BOND DELIVERY OF WHICH IS CONDITIONED UPON SIGNING BY OTHERS.—A surety may make any condition he chooses in signing a bond before delivery; and if a signature, required as a condition to his signing, is not put upon the bond, he is not bound by it: Hessell v. Johnson, 63 Mich. 623; 6 Am. St. Rep. 334, and note. But a bond which is perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered by the several obligors, and is actually delivered by the principal, without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it upon condition that it should not be delivered unless it should be signed by other persons who did not sign the same, if the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution, provided he has, upon faith of such bond, been induced to act to his own prejudice: Cutler v. Roberts, 7 Neb. 4; 29 Am. Rep. 371, and note; Webb v. Baird, 27 Ind. 368; 89 Am. Dec. 507. See notes to Sharp v. United States, 28 Am. Dec. 679-681, and Guild v. Thomas, 25 Am. Rep. 706-711; Dun v. Garrett, 93 Tenn. 650; 42 Am. St. Rep. 937, and note.

SURETYSHIP—NATURE OF CONTRACT.—The contract of a surety is in the nature of a collateral engagement to pay the debt of another, as distinguished from an original and direct agreement for the party's own act, and is in the nature of an accessory to a principal obligation: Johnson v. Ivey, 4 Cold. 608; 94 Am. Dec. 206, and note.

CASES

IN THE

SUPREME COURT

OF

IOWA.

PEATMAN *v.* CENTERVILLE LIGHT, HEAT AND POWER COMPANY.

[105 IOWA, 1.]

MECHANICS' LIEN—PERFECTING IN FAVOR OF ASSIGNEE.—An assignment of a debt before the lien is perfected invests the assignee with the right to perfect and file the lien.

MECHANICS' LIEN.—THE FILING OF A CLAIM for a mechanics' lien within the time prescribed in the statute is not essential except as against purchasers or incumbrancers in good faith without notice, whose rights accrue after the expiration of the time fixed for filing the statement.

MECHANICS' LIEN.—SERVICES FOR WHICH MAY BE CLAIMED.—One agreeing to furnish a plant for the manufacture of gas and a man to operate it for thirty days, to test the machinery, is entitled to assert a mechanics' lien for the services of such man.

MECHANICS' LIEN—SERVICE FOR WHICH MAY NOT BE ASSERTED.—One furnishing a plant to manufacture gas, and a man, for thirty days after its completion, to instruct the superintendent, is not entitled to a mechanics' lien for the value of the services rendered in such instruction.

MECHANICS' LIEN—SERVICES FOR WHICH CANNOT BE ASSERTED.—If in a contract to furnish machines is also included the right to use certain patent rights, a mechanics' lien cannot be asserted for the value of the use of such rights.

MECHANICS' LIEN INCLUDING CLAIMS OF INDEFINITE AMOUNT FOR A PURPOSE FOR WHICH A LIEN DOES NOT EXIST.—If one agrees to furnish a gas plant, to instruct the superintendent for thirty days, and also to give the right to use certain patent rights, all for a gross sum specified, and it does not appear what part thereof was for the two latter items, no lien can be established for any part of the demand.

Suit to establish and enforce a mechanic's lien. Decree for the plaintiff, and defendant appealed.

Baker & Moore, for the appellants.

Valentine & Valentine, for the appellee.

[3] ROBINSON, J. In November, 1893, the defendant, the Centerville Light, Heat, and Power Company, was engaged at Centerville in manufacturing water gas by what was known as the "Loomis Process." The gas so manufactured was not satisfactory, and one Joseph Askins submitted to the company a proposition in writing to so change and add to its appliances for making gas as to convert the system from the Loomis to the Askins process. The proposition included a guaranty as to daily capacity, and the quality and quantity, of gas which should be made from a specified quantity of hard coal, or hard coke and crude oil, and also included the following: "I further agree to furnish a man to operate the plant for thirty days for the purpose of testing the efficiency of the plant and to instruct the superintendent in its operations, and at the end of thirty days, if the plant has proved to carry out my guarantee, the plant is then to be accepted. I further agree to assign to the Centerville Light, Heat, and Power Company the exclusive use of all my patents pertaining to the manufacture of gas in and to the city or town of Centerville, Iowa." In consideration of what was to be furnished and done by Askins, the company was to pay him one thousand dollars when the plant should be accepted, and give its two promissory notes for seven hundred dollars each, one of which was to be payable in six months and the other in one year. The proposition was accepted, and Askins performed his part of the agreement thus made. After that had been done, the two notes provided for in the contract were delivered to Askins, but the payment of the one thousand dollars was not made. Askins prepared and verified a statement for a mechanic's lien upon the property improved, [4] for the sum of two thousand four hundred dollars. The statement was verified on the nineteenth day of January, 1894, but was not filed with the clerk of the district court of Appanoose county until the thirtieth day of October of the same year. On the day of its date, however, Askins, for the sum of one thousand dollars, transferred his claim for a lien by an indorsement on the statement, in form as follows: "For value received, I hereby assign the within mechanic's lien to R. I. Peatman, and authorize him to cancel the same when paid. January 19, 1894. Joseph Askins." This action is brought to recover of the company one thousand dollars, with interest, and to establish therefor a mechanic's lien.

The defendant, D. C. Campbell, was the owner of a judgment against his codefendant, the company, for twenty-one thousand three hundred and ninety-eight dollars and sixty-two cents, besides attorney's fees and costs. An execution was issued for the satisfaction of the judgment, and the property in question was sold thereunder to Campbell. The district court rendered a decree in favor of the plaintiff for the amount he asked, and for a lien therefor, and adjudged the lien so established to be senior to that of Campbell. The defendants appeal from so much of the decree as establishes a mechanic's lien, and Campbell further appeals from that part of the decree which makes his lien inferior to that established in favor of the plaintiff.

1. The appellants contend that the plaintiff is not entitled to a mechanic's lien, because it had not been perfected by the filing of a statement, as required by law, when Askins transferred the claim in suit to him. The right of the plaintiff to a lien is controlled by chapter 100 of the Acts of the Sixteenth General Assembly. Section 6 of that act contains the following: "Every person, whether contractor or subcontractor, who wishes to avail himself of the [5] provisions of this statute, shall file with the clerk of the district court of the county in which the building, erection, or other improvement to be charged with the lien is situated, a just and true statement or account of the demand due him, ... and verified by affidavit. Such verified statement or account must be filed by a principal contractor, within ninety days, and by a subcontractor within thirty days from the date on which the last of the materials shall have been furnished, or the last of the labor was performed. But a failure or omission to file the same within the periods last aforesaid, shall not defeat the lien, except against purchasers or encumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed." Mechanic's liens are assignable, and follow the assignment of the debt: Acts of the Sixteenth General Assembly, sec. 13. But it is said that the filing of the statutory statement is essential to the creation of the lien, and that an assignment of the debt before the statement is filed will not transfer the lien. The statute does not, however, make the filing of the statement essential, under section 6, to the creation of a lien, but only to preserve it against purchasers or encumbrancers in good faith without notice, whose rights accrue after the expiration of the time fixed for filing the statement: Lee v. Hoyt, 101 Iowa, 101; National Lumber

Co. v. Bowman, 77 Iowa, 706; Chicago Lumber Co. v. Des Moines Driving Park, 97 Iowa, 25. Section 1851 of the Revision of 1860, as amended by chapter 111 of the Acts of the Regular Session of the Ninth General Assembly, contained a provision in regard to the filing of the statement to charge subsequent purchasers and encumbrancers, substantially like the one under consideration. That provision was considered in Neilson v. Iowa E. Ry. Co., 51 Iowa, 184, 33 Am. Rep. 124, and held, in effect, not to require the [6] filing of the statement in order to perfect the lien as against the owner. The case of Bissell v. Lewis, 56 Iowa, 231, arose under the statute we are now considering, and it was there said: "It is quite clear it is not essential, to the establishment of the lien under consideration, that any lien statement should have been filed in the clerk's office." In our opinion, the filing of the statement was not essential to the existence of the lien in question. That was created by the furnishing of the labor and material, as provided in the contract, and Askins was entitled to a lien before he assigned the debt upon which this action is founded. Therefore, the assignment of the debt and the indorsement upon the statement for a lien had the effect to transfer the lien to the plaintiff. The statement was prepared and verified by Askins, and by him delivered to his agent for filing, but for some unexplained reason was not filed until the last of October, as stated. Campbell is not a subsequent encumbrancer in good faith, for the reason that the judgment through which he claims was not rendered until the 17th of September, 1895, nearly a year after the statement was filed.

It is said, however, that this court has decided that, until the statement for a lien is filed, the lien is not so far completed as to be assignable, and language was used in the opinion in Merchant v. Ottumwa Water Power Co., 54 Iowa, 451, which affords some ground for that claim. But a careful examination of the case shows that the language of that character used was not essential to the decision of the questions presented. It appears that in that case an order was issued by the owner to the contractors in November, 1875, in part payment of the contract price, before the contract was complete, and before the contractor had become entitled to a lien. In April, 1876, the order was assigned to Merchant, but the contract was not completed until [7] January, 1877. It does not appear that the contractors ever claimed a lien, or that they attempted to assign any interest in one. Merchant recovered judgment on the order

against the owner, in February, 1877. Ten months later he filed a statement for a lien and then commenced an action to enforce the lien claimed, as against an encumbrancer whose rights accrued December 1, 1876. It is clear, under the facts stated, that the parties to the assignment of the order did not intend to transfer any interest in a mechanic's lien by the assignment, and that the case was rightly decided, but it cannot be regarded as an authority in this case. It should also be observed that the court expressly stated that the provision of chapter 100 of the Acts of the Sixteenth General Assembly, which makes the lien follow the assignment of the debt, was not in force when the assignment there in question was made. The case of Brown v. Smith, 55 Iowa, 31, involved the right of the assignee of a time check to file a statement for, and to enforce, a mechanic's lien. The time check was issued to an employé of a subcontractor, who, so far as is shown, did not claim a lien. The facts are unlike those involved in this case. The opinion is brief, and is made to depend in part upon the case of First Nat. Bank v. Day, 52 Iowa, 680, which did not arise under the provisions of law in regard to the assignment of a lien which apply here, and also, in part, upon the Merchant case. The case of Langan v. Sankey, 55 Iowa, 52, is similar in principle to that of Brown v. Smith, 55 Iowa, 31, and followed that and the Merchant case. In each of the cases decided by this court upon which the appellant relies, the controlling facts and the statutory provisions involved were so unlike those which are material in this case that the cases cannot fairly be regarded as in conflict with the conclusion we reach in this case. Although the statute provides that "mechanics' liens are assignable, and shall follow the assignment of the debt," yet a person entitled to such a lien may waive it, and may also assign the debt without the lien. But in this case the parties to the assignment intended to preserve the lien, and to assign it with the debt, and what they did for that purpose would have been effectual, had the assignor been entitled to a lien. This conclusion is required by the plain provisions of the statute, as applied to the facts of this case, and by the cases of Neilson v. Iowa E. Ry. Co., 51 Iowa, 184, 33 Am. Rep. 124, and Bissell v. Lewis, 56 Iowa, 231. We do not find it necessary to determine whether, in case the filing of a statement is required to preserve the lien, as against other persons than the owner, the statement may be prepared and filed by the assignee.

2. It is claimed that the plaintiff is not entitled to a lien for

his claim, because the contract on which it was based required Askins to furnish a man to operate the plant for thirty days, and to assign to the company the exclusive use of certain patents, and that a lien for such items cannot be allowed. A mechanic's lien may be acquired by any mechanic or other person "who shall do any labor upon, or furnish any materials, machinery, or fixtures, for any building, erection, or other improvement upon land." Under this provision a lien could have been obtained for the labor of a man to operate the plant for thirty days, in order to test the machinery and cause it to meet the requirements of the guaranty; but the contractor was not entitled to a lien for services rendered to instruct the superintendent, nor for the assignment of patent rights which were not included in the use of the appliances which the contractor was required to furnish. The contract required the payment of the sum of two thousand four hundred dollars for the labor and appliances [9] furnished, and also for the instruction given the superintendent, and the right to use the patents described. That right is not shown to be included in the right to use the appliances furnished. It must be presumed that the instruction given, and the right to use the patents, which were to be assigned, were of substantial value; but we are without means of ascertaining what it was, and therefore cannot determine the amount for which a lien might properly be established. The effect of this is to prevent the establishment of a lien for any part of the plaintiff's claim: See Morrison v. Minot, 5 Allen, 403; McMaster v. Merrick, 41 Mich. 505; Dennis v. Smith, 38 Minn. 494. We conclude that the district court erred in establishing a lien in favor of the plaintiff, and its decree is reversed.

MECHANICS' LIENS—ASSIGNMENT—RIGHTS OF ASSIGNEE.—A perfected mechanics' lien may be assigned, and the assignee may maintain an action in his own name for its enforcement. He succeeds to all the rights of his assignor: Note to Davis v. Crookston Water Works Co., 47 Am. St. Rep. 626.

MECHANICS' LIENS.—FAILURE TO FILE STATEMENT of claim in accordance with the statute relating to mechanics' liens will not deprive one furnishing material to be used in the construction of a house of the benefit of such lien, when the rights of bona fide purchasers are not involved, and by the statute the lien attaches upon the furnishing of materials for a structure to be erected on land under a contract with the owner: Kirkwood v. Hoxie, 95 Mich. 62; 35 Am. St. Rep. 549, and note. The purpose of record of a mechanic's lien is to give notice to third persons: Lyon v. Logan, 68 Tex. 521; 2 Am. St. Rep. 511. Compare, however, Green v. Green, 16 Ind. 253; 79 Am. Dec. 428, and note; Ramsey's Appeal, 2 Watts, 228; 27 Am. Dec. 301.

MECHANICS' LIENS — CLAIM — LUMPING CHARGE. — A claim for a mechanic's lien containing a lumping charge in which

are mingled items for which a lien is given with items for which no lien is given is insufficient to support the lien: Williams v. Toledo Coal Co., 25 Or. 426; 42 Am. St. Rep. 799. Where lienable and non-lienable items are included in one contract for a specified sum, or are made the basis of a lumping charge, so that it cannot be seen from the contract or account what properly is charged to each, the benefit of the mechanic's lien law is lost: Getty v. Ames, 30 Or. 573; 60 Am. St. Rep. 835, and note; Wharton v. Real Estate Inv. Co., 180 Pa. St. 168; 57 Am. St. Rep. 629, and note.

DOUGHTY *v.* MEEK.

[105 IOWA, 16.]

JUDGMENT BY CONFESSION MAY BE ENTERED NUNC PRO TUNC as of the date of the filing of the statement of confession, where it was the duty of the clerk to have entered such judgment forthwith upon the filing of the statement, and the delay in entering it was due solely to his fault.

THE ENTRY OF A JUDGMENT NUNC PRO TUNC validates all prior proceedings, including the issuing of executions.

A JUDGMENT ENTERED NUNC PRO TUNC must be respected and enforced in the same manner and to the same extent as if entered at the proper time.

JUDGMENT AND EXECUTION—SATISFACTION OF BY LEVY.—If a debtor of a judgment debtor was garnished and admitted his indebtedness, specifying the amount, and there is no showing that the garnishment was ever released, the plaintiff in the execution must be charged with the amount admitted to be due, and the judgment credited therewith.

Suit to enjoin the sale of real property on execution on the ground that there was no valid judgment on which execution could issue and that the debt had been paid. Decree for the defendant, plaintiff appealed.

Work & Lewis and M. B. Davis, for the appellant.

Mitchell & Sloan, for the appellees.

[17] DEEMER, C. J. On the twentieth day of December, 1876, appellant made and executed a confession of judgment in favor of appellee Meek upon a note for the sum of two hundred dollars, executed in January, 1876. This confession was filed with the clerk of the district court in and for Van Buren county on or about January 1, 1877, but no entry of judgment was made upon the court records until the trial of this case, at which time the court ordered an entry of judgment as of the first regular term in the year 1877. On the twenty-first day of July, 1896, an execution issued from the office of the clerk of the district court upon a pretended judgment in favor of Meek and against Doughty, directed to the sheriff of Woodbury county. This

execution was levied upon certain real estate in Woodbury county belonging to Doughty. This suit is to enjoin and restrain the sale of the real estate so levied upon. The trial court was evidently of opinion that no judgment had been rendered upon the statement of confession at the time the execution issued, but it ordered the rendition of judgment nunc pro tunc, and held that this validated the writ, and that plaintiff's petition should be dismissed. In support of the ruling it is contended that the filing of the statement of confession was in fact the rendition of a judgment, that the act of the clerk and the court with reference thereto was purely ministerial, that the court was justified in directing a nunc pro tunc entry of judgment, and that such entry covered all defects in the issuance of the execution. The argument in support of this contention is to the effect that, when a statement of confession is filed, the law, in the absence of the judge, at once pronounces the judgment, and it becomes the duty of the clerk to make the entry forthwith; that his failure to do so may be cured at any time by a nunc pro tunc entry; [18] and that such entry, when so made, validates all prior proceedings, including the issuance of execution. That courts possess the power to enter judgments nunc pro tunc is conceded, but the exercise of such power presupposes the actual rendition of a judgment. The right to a judgment will not furnish the basis for such an entry: Gray v. Brignardello, 1 Wall. 627; Worley v. Shong, 35 Neb. 311; Cassidy v. Woodward, 77 Iowa, 355; Freeman on Judgments, sec. 68.

The inquiry yet remains, What effect is to be given the statement of confession when it is filed with the clerk? This question is not a new one to this court. In the case of Risser v. Martin, 86 Iowa, 392, which involved the right of a court to enter a judgment nunc pro tunc upon a statement of confession, we said: "It is true the court made no order, ... but the law operated in lieu of formal action by the court as a direction to the clerk to enter judgment. In legal effect, the rights of the parties were the same that they would have been had the court ordered the judgment to be entered. It is said that a judgment nunc pro tunc is always proper where a judgment has been ordered, but the clerk has failed or neglected to copy it into the record. In this case the confession expressed the amount of the debt, and the law fixed the judgment to which the plaintiffs were entitled." The point now under consideration is conclusively determined by this statement of the law, and needs no further elucidation.

2. At the time the execution issued there was no formal entry of judgment, and it is argued that the nunc pro tunc entry did not validate the execution. It is well settled that "there can be no judgment until it is entered in the proper record of the court. It cannot exist in the memory of the officers of the court, nor in [19] memoranda entered upon books not intended to preserve the record of judgments": Winter v. Coulthard, 94 Iowa, 312; Balm v. Nunn, 63 Iowa, 642; Case v. Plato, 54 Iowa, 64. In one of these cases it is said that "there being no valid existing judgment when the execution issued, it is void." This declaration had no reference, however, to the effect that should be given a nunc pro tunc entry, and it is not to be regarded as conclusive of the point now under consideration. Mr. Freeman, in his work on Judgments, at section 67, says: "With the exception pointed out in the previous section [relating to the rights of third persons], a judgment entered nunc pro tunc must be everywhere received and enforced in the same manner and to the same extent as though entered at the proper time. Though an execution may have issued when there was nothing on the record to support it, yet the omission is one of evidence, and not of fact; and, the evidence being supplied in a proper manner, full force and effect will be given to the fact, as if the evidence had existed from the beginning." Mr. Black, in his treatise on Judgments, at section 136, announces practically the same doctrine. These statements are authorized by the following, among other, authorities: Bush v. Bush, 46 Ind. 70; Tapley v. Goodsell, 122 Mass. 176; Parker v. Rugg, 9 Gray, 209; Graham v. Lynn, 4 B. Mon. 17; 39 Am. Dec. 493. Following this almost unbroken line of decisions, we are constrained to hold that the nunc pro tunc entry so operated, as to save the execution which had theretofore been issued.

3. Finally, it is insisted that the claim or judgment had been satisfied in whole or in part prior to the issuance of the execution, the enforcement of which is sought to be enjoined. In 1877 an execution issued, which was served by levying upon thirteen sacks of flour and forty bushels of oats, and by garnishing four [20] supposed debtors of Doughty. The sheriff's return discloses that the property was returned to Doughty, by order of Meek's attorney, upon condition that Doughty pay the costs. The return further shows that Doughty paid the costs. Of the four garnishees all denied being indebted to Doughty save one, who admitted he owed eighteen dollars and forty-five cents.

No case was ever docketed against this garnishee, no judgment rendered, and no showing that he ever paid the amount to Meek, or to anyone for him. There is no record evidence, however, that the garnishee who admitted this indebtedness was ever discharged, and Doughty squarely denies that the garnishment was released, and denies having received the amount of this indebtedness from the garnishee. The amount admitted by this garnishee to be due was eighteen dollars and forty-five cents. As the levy by garnishment is admitted, and as there is no sufficient showing by appellee that this garnishee was released, the appellee should be charged with the amount admitted to be due, and the same should be credited upon the judgment as of date November 3, 1877. Claim is made that the note upon which the confession of judgment was based was intended simply as security for an indebtedness due from one Nelson to Meek, and that, after the confession was executed, Nelson paid the debt. It is sufficient to say that the evidence does not support this contention. The debt was Doughty's, and Nelson did not pay it. With the modification above suggested, the decree is affirmed.

Modified and affirmed.

JUDGMENTS—ENTRY NUNC PRO TUNC—EFFECT.—The office of a nunc pro tunc entry is to record some act of the court done at a former term which was not then carried into the record: Cleveland Leader Printing Co. v. Green, 52 Ohio St. 487; 49 Am. St. Rep. 725, and note. Except as to the rights of third parties a judgment nunc pro tunc is retrospective, and has the same force and effect, to all intents and purposes, as if it had been entered at the time when the judgment was originally rendered or ought to have been rendered: See monographic note to Ninde v. Clark, 4 Am. St. Rep. 833, on the nunc pro tunc entry of judgment.

JUDGMENT—SATISFACTION BY LEVY OF EXECUTION.—The effect of a levy upon personal property of the judgment debtor, sufficient in value to satisfy the execution, has been considered by many judges as per se an extinguishment of the judgment and therefore a satisfaction of the execution: See monographic note to Trapnell v. Richardson, 58 Am. Dec. 350-363, discussing the question.

HAMBY *v.* SAMSON.

[105 IOWA, 112.]

DOGS—PROPERTY IN.—By the common law, dogs were not recognized as property and were not subjects of larceny, but, under a statute making it a crime to steal any money, goods, or chattels of another, one may be guilty of larceny in stealing a dog. It is a chattel.

Habeas corpus, seeking a release from a warrant purporting to authorize the arrest of the petitioner for stealing a dog. On

the hearing he was discharged, and the sheriff, in whose custody he was, appealed.

Raymond & Raymond, for the appellant.

Clarke & Cohenour, for the appellee.

[112] DEEMER, C. J. The sole question presented by this appeal is whether or not a dog is the subject of larceny. That it was not at common law is conceded. The reasons for this were twofold: 1. Because it had no intrinsic value; and 2. Because it was not fully domesticated—but by nature base. The courts held that dogs, although reclaimed, could not be used for food, but were kept for the mere whim or pleasure of their owners, and therefore had no intrinsic value. A great deal of research and eloquence has been wasted in attempting to show the fallacy of this rule. It appears to be well [113] settled, however, that, in the absence of statutory modification of the common law, dogs are not the subject of larceny: State v. Lymus, 26 Ohio St. 400; 20 Am. Rep. 772; State v. Doe, 79 Ind. 9; 41 Am. Rep. 599. When the statute relating to larceny covers "personal property in general," or "anything of value," some courts hold that a dog is included, and becomes the subject of larceny: Mullaly v. People, 86 N. Y. 365; Harrington v. Miles, 11 Kan. 480; 15 Am. Rep. 355; Hurley v. State, 30 Tex. App. 333; 28 Am. St. Rep. 916; State v. Yates, 19 Week. L. Bull. 150; 10 Cr. Law Mag. 439. But the cases are by no means harmonious upon this proposition: See Ward v. State, 48 Ala. 161; 17 Am. Rep. 31. In some states it is suggested that in subjecting dogs to taxation they are thereby made the subject of larceny under the generic terms "personal property" or "chattels" found in the statutes: Commonwealth v. Hazelwood, 84 Ky. 681; Mullaly v. People, 86 N. Y. 365. It is also said by other quite as respectable courts that these taxes are not imposed on the theory that dogs are property, but as police regulations, and therefore such taxation does not bring them within the statute: State v. Doe, 79 Ind. 9; 41 Am. Rep. 599; and State v. Lymus, 26 Ohio St. 400; 20 Am. Rep. 772. See, also, Sentell v. New Orleans etc. R. R. Co., 166 U. S. 698. Our statute (Code 1873, section 3902) makes it a crime for anyone to steal any money, goods, or chattels of another; and, if dogs are intended to be included, it must be under the terms "goods and chattels." That they are not goods is clear. "Chattels," however, is a broader and more comprehensive term, and in-

cludes all kinds of property except the freehold and things which are a parcel of it. The supreme court of Kentucky, in the case of Commonwealth v. Hazelwood, 84 Ky. 681, held that a dog was a "chattel," basing its holding upon the thought that the laws of that state recognized dogs as property, for the reason that they imposed a tax upon them, made the owner liable for damages done, and recognized the animal as property in all civil proceedings. But the supreme court [114] of Pennsylvania, in the case of Findlay v. Bear, 8 Serg. & R. 571, held to exactly the contrary doctrine. See, also, Regina v. Robinson, Bell's Crown Cas.; 28 Law J. Mag. Cas. 58. Those courts which hold that a dog is not "personal property," a "thing of value," or a "chattel" bottom their conclusion upon the assumption that it is not property in the strict sense of that term, and that dogs as a class have no intrinsic value. In the case of Warren v. State, 1 G. Greene, 106, we held that a raccoon was ferae naturae, and of so base a nature, in contemplation of law, as that one who stole it was not guilty of a larceny; citing Norton v. Ladd, 5 N. H. 204. But in the subsequent case of Anson v. Dwight, 18 Iowa, 241, which was, it is true, a civil case, we said "Dogs may be personal property, and have value." Neither of these cases decides the question now before us, although it must be conceded that, if we follow the rule of the Warren case to its logical conclusion, and hold that the terms "goods and chattels," as used in this criminal statute, are to be interpreted according to the strict rules of the common law, we must ultimately decide that dogs are not the subject of larceny. Section 45, paragraph 2, of the code of 1873, provides that words and phrases should be construed according to the context and the approved usage of the language; paragraph 10, that "the word 'property' includes personal and real property"; and that (paragraph 9) the words "personal property" include money, goods, chattels, evidences of debt, and things in action. In the case of State v. Phipps, 95 Iowa, 491, we held that the word "chattel," as used in the criminal statute relating to malicious mischief, covered horses and every other kind of personal property. We are constrained to believe that the definition of the words "goods and chattels," as used in the statute under consideration, should be referred to the common understanding at the time when the statute was enacted, and not to the strict [115] rules of the common law that have no application to our present ideas with reference to the value and use of domesticated animals. No argument is needed to demon-

strate that dogs are of much greater value to man than some animals to which the common law attributed value because of their use for food. Much that is said by Justice Earl in the Mullaly case might be quoted with profit, but the length of this opinion forbids. There are other provisions of the code of 1873 which recognize property in dogs. Thus, we find that an owner is liable for all damages done by his dog (section 1485); that dogs are assessable both by the county and city authorities (see Acts Twentieth General Assembly, chapter 70, and section 499, of the code of 1873); and that cities may require dogs to be kept upon the premises of the owners thereof (Seventeenth General Assembly, chapter 25). While these are all in the nature of police regulations, yet they clearly recognize property in dogs; and it seems to us they are comprehended within the term "chattels" as used in the statute defining larceny. Surely, it was not the intent of the legislature to recognize dogs as property for the purposes of taxation, and yet leave them to the mercy of thieves. We reach this conclusion unmindful of the fact that the legislature in adopting the new code added after the word "chattels" as it appears in the code of 1873 these words: "Including all domesticated or restrained animals." In our opinion, the statute covered "dogs" before its amendment, and the added words have reference to other animals not covered by the generic term "chattels." We are of opinion that a dog is the subject of larceny, and that the trial court erroneously discharged the appellee.

Reversed.

Of Property in Dogs and the Remedies for Its Enforcement.*

At Common Law and in General.—The dog has been the subject of much discussion among our courts. Judges have referred to him with eloquent praise as "the negro's associate, and often his only property, the poor man's friend, and the rich man's companion, and the protector of women and children, hearthstones and henroosts"; as an animal whose wrongs "have been touchingly described by poets," and whose "virtues have been celebrated in song." History has been searched for instances of his fidelity and affection, and the act of a spaniel in saving the life of William of Orange, however much it may have done for the cause of religious toleration, has at least redounded to the great benefit of dogs of later generations whose legal standing has been brought in question. At common law, while property rights in dogs were recognized, they were considered of a base, qualified, and incomplete sort. The statement

*REFERENCE TO MONOGRAPHIC NOTES.

Property in inferior animals: 70 Am. Dec. 259–262.

Property in dogs: 46 Am. Rep. 425–428.

is often made that at common law a dog was not considered property, for the reason that dogs are base in their nature and kept merely for whims or pleasure: Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317; 66 Am. St. Rep. 754; but the correct statement of the common-law rule is, that dogs were considered to be property of an inferior sort, and for some purposes only entitled to less regard and protection than property in other animals: Woolf v. Chalker, 31 Conn. 121; 81 Am. Dec. 175; Wilton v. Weston, 48 Conn. 325; Graham v. Smith, 100 Ga. 434; 62 Am. St. Rep. 323; Jemison v. Southwestern R. R., 75 Ga. 444; 58 Am. Rep. 476; Cole v. Hall, 103 Ill. 30; Independence v. Trouvalle, 15 Kan. 73; State v. Topeka, 36 Kan. 76; 59 Am. Rep. 529; Uhlein v. Cromack, 109 Mass. 273; Mitchell v. Williams, 27 Ind. 62; United States v. Gideon, 1 Minn. 226; (*292); Carthage v. Rhodes, 101 Mo. 175; Davis v. Commonwealth, 17 Gratt. 617; Maclin's case, 3 Leigh, 809; Sentell v. New Orleans etc. R. R. Co., 166 U. S. 698; State v. Lymus, 26 Ohio St. 400; 20 Am. Rep. 772.

That dogs were considered property for some purposes is seen from the fact shown later herein that the owner could sue for their conversion or injury, while the qualified nature of the property right appears in the common-law rule also adverted to herein, that dogs were not regarded as the subjects of larceny. The reasons for the common-law rule are generally stated in the cases cited to be that dogs are unfit for food, are subject to the most distressing and incurable disease known, and easily communicable to men and beasts, and that they are chiefly propagated, kept, and used for purposes which utilize the natural ferocity and inclination to mischief that characterize them: Woolf v. Chalker, 31 Conn. 121; 81 Am. Dec. 175; Sentell v. New Orleans etc. R. R. Co., 166 U. S. 698. In the last case cited, Justice Brown summarizes the matter in a manner which leaves little else to be said. He says: "The very fact that they are without the protection of the criminal law shows that property in dogs is of an imperfect and qualified nature. They are not considered as being upon the same plane with horses, cattle, sheep, and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals kept for pleasure, curiosity, or caprice. They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can be hardly said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness."

In the United States.—It is much easier to determine the common-law standing of dogs as property than to determine their exact status in the United States, where there has been a tendency to eliminate the inconsistencies of the old rule and to recognize a full

and complete property in dogs. Under the old rule, they stood between animals ferae naturae in which, until killed or subdued, there was no property, and domestic animals, in which the right of property was perfect and complete: Sentell v. New Orleans etc. R. R. Co., 166 U. S. 698. They are now generally considered as domestic animals: Shaw v. Craft, 37 Fed. Rep. 317; State v. Giles, 125 Ind. 124; Dodson v. Mock, 4 Dev. & B. 146; 32 Am. Dec. 677; as much the subject of property or ownership as horses, cattle, and sheep: State v. McDuffie, 34 N. H. 523; 69 Am. Dec. 516; Hurley v. State, 30 Tex. App. 333; 28 Am. St. Rep. 916. Contra, State v. Harriman, 75 Me. 562; 46 Am. Rep. 423, weakened by the dissenting opinion of Appleton, C. J. They have been held to be things of value: Hurley v. State, 30 Tex. App. 333; 28 Am. St. Rep. 916. The word "chattel," as used in statutes, covers every kind of personal property: State v. Phipps, 95 Iowa, 491; and is held to include dogs: Hamby v. Samson, 105 Iowa, 112; ante, p. 285; Commonwealth v. Hazlewood, 84 Ky. 681; Mullaly v. People, 86 N. Y. 365; Harington v. Miles, 11 Kan. 480; 15 Am. Rep. 355; People v. Maloney, 1 Park. C. C. 593; State v. Brown, 9 Baxt. 53; 40 Am. Rep. 81; though the contrary is also held: State v. Lymus, 26 Ohio St. 400; 20 Am. Rep. 772; Findlay v. Bear, 8 Serg. & R. 570.

At common law, while it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, for since larceny was punishable by death it was considered improper that a man should die for a dog, an animal of base nature and without intrinsic value. The reasons for the common-law rule have disappeared, and American courts have endeavored upon various pretexts to moderate its rigor.

In many states, as we shall see, statutes have been enacted making dogs the subject of taxation. Courts have disagreed as to whether the effect of such legislation is to make dogs property in the fullest sense. In support of the negative of the proposition, it is held that such statutes are not imposed on the theory that dogs are property, but as mere police regulations: State v. Lymus, 26 Ohio St. 400; 20 Am. Rep. 772; State v. Doe, 79 Ind. 9; 41 Am. Rep. 599; Ex parte Cooper, 3 Tex. App. 489; 30 Am. Rep. 152. See Sentell v. New Orleans etc. R. R. Co., 166 U. S. 698; Hendrie v. Kalthoff, 48 Mich. 306. The reasoning of these cases is that the discrimination in the mode of taxing dogs shows that "the legislature did not intend to place them in all respects upon the footing of other personal property. The tax is levied per capita on the dogs and not ad valorem. Dogs are not by these statutes recognized as subjects of general taxation for revenue purposes and taxed accordingly. The object of the tax has been the nonproduction of dogs, rather than the production of revenue": State v. Doe, 79 Ind. 9; 41 Am. Rep. 599. By statute in Ohio it is provided that any dog returned for taxation and the tax on which is paid when due shall be regarded as, and shall be, property: Griggs v. Dittoe, 52 Ohio St. 601. In other states, it is held that the effect of taxing dogs is to recognize them as property in the fullest sense: 2 Wharton's Criminal Law, sec. 1755; Commonwealth v. Hazlewood, 84

Ky. 681; Hamby v. Samson, 105 Iowa, 112; ante, p. 285; Mullaly v. People, 86 N. Y. 365; People v. Maloney, 1 Park. C. C. 593; because it can scarcely be supposed that dogs would be taxed and yet ownership of them be refused recognition; that they would be considered property for the purposes of taxation and their owners be left without protection against thieves. Where dogs are not taxed, this has been regarded as evidence that the law does not recognize them as property: Ward v. State, 48 Ala. 161; 17 Am. Rep. 31; Carthage v. Rhodes, 101 Mo. 175; and in some cases, statutes imposing taxes upon dogs have provided that henceforth they shall be considered personal property: Commonwealth v. Depuy, 148 Pa. St. 201; Harris v. Eaton, 20 R. I.

Even at common law, dogs were treated as personal property to the extent that, on the death of their owner, if not disposed of by will, they went to his executor or administrator as such: Haywood v. State, 41 Ark. 479; Mullaly v. People, 86 N. Y. 365; Williams on Executors, 9th ed., 830; though it has been argued that they are not property in the fullest sense since they are not assets of the estate of a deceased person, nor are inventoried or appraised: Jemison v. Southwestern R. R., 75 Ga. 444; 58 Am. Rep. 476; Ward v. State, 48 Ala. 161; 17 Am. Rep. 31.

Under a statute providing that "if any person shall willfully and maliciously kill, maim, beat, or wound any horse, cattle, goat, sheep, or swine, or shall willfully injure or destroy any other property of another, he shall be punished," et cetera, the willful and malicious killing of a dog has been considered not a punishable offense, a dog not being included within the expression "any other property": State v. Marshall, 13 Tex. 55. The exemption of train railways from local taxation does not include exemption from liability to pay the legal tax on dogs, such tax not being a tax on property within the meaning of the exemption: Hendrie v. Kalthoff, 48 Mich. 306; yet an assault may be justified in defense of one's dog: State v. McDuffie, 34 N. H. 523; 69 Am. Dec. 516.

Remedies of Owner—Trespass, Trover, and Replevin—Measure of Recovery.—However much disagreement there may be among the courts as to the exact incidents and limitations of property rights in dogs, all go at least to the length of the common-law rule allowing the owner of a dog to recover in trespass for injuries done him, or in trover or replevin for his asportation or detention: Sentell v. New Orleans etc. R. R. Co., 166 U. S. 698; Parker v. Mise, 27 Ala. 480; 62 Am. Dec. 776; Mayor v. Meigs, 1 McAr. 53; 29 Am. Rep. 578; White v. Brantley, 37 Ala. 430; Graham v. Smith, 100 Ga. 434; 62 Am. St. Rep. 323; Brent v. Kimball, 60 Ill. 211; 14 Am. Rep. 35; Cummings v. Perham, 1 Met. 555; Uhlein v. Cromack, 109 Mass. 273; Helsrodt v. Hackett, 34 Mich. 283; 22 Am. Rep. 529; Ten Hopen v. Walker, 96 Mich. 236; 35 Am. St. Rep. 598; State v. McDuffie, 34 N. H. 523; 69 Am. Dec. 516; Dodson v. Mock, 4 Dev. & B. 146; 32 Am. Dec. 677; Kinsman v. State, 77 Ind. 132; People v. Mahoney, 1 Park. C. C. 593; Mullaly v. People, 86 N. Y. 364; People v. Campbell, 4 Park. C. C. 386; Anson v. Dwight, 18 Iowa, 241; Lentz v. Stroh, 6 Serg. & R. 34; Findlay v. Bear, 8 Serg. & R. 570; Commonwealth

v. Hazlewood, 84 Ky. 681; Wheatly v. Harris, 4 Sneed, 468; 70 Am. Dec. 258; Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317; 66 Am. St. Rep. 754; St. Louis etc. Ry. Co. v. Hanks, 78 Tex. 300; Hurley v. State, 30 Tex. Crim. App. 333; 28 Am. St. Rep. 916; Heiligmann v. Rose, 81 Tex. 222; 26 Am. St. Rep. 804; Perry v. Phipps, 10 Ired. 259; 51 Am. Dec. 387; Mowery v. Salisbury, 82 N. C. 175; Cantling v. Hannibal etc. R. R. Co., 54 Mo. 385; 14 Am. Rep. 476; Johnson v. McConnell, 80 Cal. 545; Jones v. Illinois Cent. R. R. Co., 75 Miss. 970; Nehr v. State, 35 Neb. 638; Davis v. Commonwealth, 17 Gratt. 617; Maclin's case, 3 Leigh, 877.

Trespass lies in favor of the owner for killing a dog which was at the time in the possession of a third person under a loan: White v. Brantley, 37 Ala. 430; and the right of the owner to recover for injury to his dog is not lost by his killing him under the honest but mistaken belief that he was fatally injured: Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317; 66 Am. St. Rep. 754.

It is generally stated that dogs have no intrinsic value, by which is meant "a value common to all dogs as such, and independent of the particular breed or individual": Sentell v. New Orleans etc. R. R. Co., 166 U. S. 698. Therefore, in determining the amount of recovery, the facts and circumstances of the special case in hand are all important. The materiality of the market value of property in determining the proper measure of damages for its destruction was considered by us in a recent note, and the conclusion reached that it may be disregarded as a test where, though the property in question has some market value, such value is clearly not the true test of the injury suffered by the plaintiff, and where from the situation of the property, or its character, or from some other cause, it cannot be said to have a market value: See monographic note to Watt v. Nevada Cent. R. R. Co., 62 Am. St. Rep. 792. In an action to recover for the injury, destruction, or asportation of a dog, the question of value should be left to the jury: Heiligman v. Rose, 81 Tex. 222; 26 Am. St. Rep. 804; Spray v. Ammerman, 66 Ill. 309; Uhlein v. Cromack, 109 Mass. 273; State v. McDuffie, 34 N. H. 523; 69 Am. Dec. 516; Dodson v. Mock, 4 Dev. & B. 146; 32 Am. Dec. 677; Dunlap v. Snyder, 17 Barb. 561. It is not necessary that pecuniary value be proved: State v. McDuffie, 34 N. H. 523; 69 Am. Dec. 516. The frequent statement that dogs have no market value, while relatively true, cannot govern in all cases. It may be difficult in the majority of cases to ascertain the market value of a dog, but such a result may in some cases be accomplished. Property in dogs being recognized, the law implies that some damage results from every invasion of one's rights therein, and the basis of recovery may be either the market value, if the dog has any, or some special or pecuniary value to the owner that may be ascertained by reference to the usefulness or services of the dog: Heiligman v. Rose, 81 Tex. 222; 26 Am. St. Rep. 804; Spray v. Ammerman, 66 Ill. 309; Parker v. Mise, 27 Ala. 480; 62 Am. Dec. 776; Brent v. Kimball, 60 Ill. 211; 14 Am. Rep. 35; Cantling v. Hannibal etc. R. R. Co., 54 Mo. 385; 14 Am. Dec. 476; Uhlein v. Cromack, 109 Mass. 273; Bowers v. Horen, 93 Mich. 420; 32 Am. St. Rep. 513;

Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317; 66 Am. St. Rep. 754.

In an action to recover damages for the killing of a shepherd dog, chiefly valuable for his ability and willingness to herd cattle and horses, farmers who know the characteristics and qualities of the dog, and the value of such an animal to a farmer who keeps stock, may testify as to his value: Bowers v. Horen, 93 Mich. 420; 32 Am. St. Rep. 513. Contra, Dunlap v. Snyder, 17 Barb. 561.

Experts have been allowed to give their opinions as to the value of dogs, the opinions being based either on actual sales or their general observations and experience: Cantling v. Hannibal etc. R. R. Co., 54 Mo. 385; 14 Am. Rep. 476, following Brill v. Flagler, 23 Wend. 354; overruled by Dunlap v. Snyder, 17 Barb. 561. The market value of a dog may be shown by evidence of his pedigree: Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317; 66 Am. St. Rep. 754. Where the dog in question is not shown to have had any market value, it is error to allow the plaintiff to state what such market value was: Smith v. Griswold, 15 Hun, 273. In order to render opinions as to the value of a dog competent, it should first be shown that the dog in question is a marketable animal, either belonging to some peculiar breed, or possessing some peculiar qualities which make him an animal usually vendible at some proximately regular price: Brown v. Hoburger, 52 Barb. 15. If evidence is introduced of the excellent qualities of a dog for the purpose of increasing the damages recoverable in trespass for his death, the defendant may, in order to reduce the damages, introduce evidence of the dog's worthlessness or vicious propensities: Lentz v. Stroh, 6 Serg. & R. 34; Dunlap v. Snyder, 17 Barb. 561; Reynolds v. Phillips, 13 Ill. App. 557; Meneley v. Carson, 55 Ill. App. 74.

Justification for Killing or Injuring Another's Dog—What May be Shown in Defense.—The protection which the law affords to property in dogs does not go to the length of overlooking the vicious tendencies which the civilized dog inherits from his savage ancestors, and may be said to be conditioned upon his good behavior. Where one person kills or injures another's dog in order to protect himself or his property from the dog's ferocity or depredations, he will, in a proper case, be held blameless and no recovery will be allowed. The right of any person, without regard to any right of property in the owner, to kill a mad dog, or one that is justly suspected of being mad, was recognized at common law, and is generally recognized in this country: Woolf v. Chalker, 31 Conn. 121; 81 Am. Dec. 175; Brent v. Kimball, 60 Ill. 211; 14 Am. Rep. 35; similarly as to a dog lately bitten by a mad dog, if found running at large: Putnam v. Payne, 13 Johns. 312. A person is justified in killing a dog which attacks him, or a ferocious dog found running at large and menacing the health or safety of others: Reynolds v. Phillips, 13 Ill. App. 557; Brent v. Kimball, 60 Ill. 211; 14 Am. Rep. 35; Nehr v. State, 35 Neb. 638; Credit v. Brown, 10 Johns. 365; Spaight v. McGovern, 16 R. I. 678; Putnam v. Payne, 13 Johns. 312; Maxwell v. Palmerton, 21 Wend. 407; Dunlap v. Snyder, 17 Barb. 561; Woolf v. Chalker, 31 Conn. 121; 81 Am. Dec. 175; Harris v. Eaton, 20 R. I. 000; Brown

v. Carpenter, 26 Vt. 638; 62 Am. Dec. 603. One has not a right to kill a dog on the owner's premises because on former occasions he has bitten other persons: Perry v. Phipps, 10 Ired. 259; 51 Am. Dec. 387; nor because it was a dangerous animal, and accustomed to bite those who came near it, if it was properly confined on the owner's premises: Uhlein v. Cromack, 109 Mass. 273. A person sued for killing or injuring the dog of another may exonerate himself from liability by showing that his act was necessary to the proper protection of his premises or property from trespass or injury, or of himself or family from annoyance: Woolf v. Chalker, 31 Conn. 121; 81 Am. Dec. 175; Simmonds v. Holmes, 61 Conn. 1; Dunning v. Bird, 24 Ill. App. 270; Lipe v. Blackwelder, 25 Ill. App. 119; Bradford v. McKibben, 4 Bush, 545; Meneley v. Carson, 55 Ill. App. 74; Marshall v. Blackshire, 44 Iowa, 475; Hibberd v. Preston, 90 Mich. 221; 30 Am. St. Rep. 426; Leonard v. Wilkins, 9 Johns. 233; Hinckley v. Emerson, 4 Cow. 351; 15 Am. Dec. 383; Brill v. Flagler, 23 Wend. 354; Nerh. v. State, 35 Neb. 638; King v. Kline, 6 Pa. St. 318; Harris v. Eaton, 20 R. I. 000. The right to kill a dog found trespassing and injuring property is not affected by the relative values of the dog and the property being injured: Simmonds v. Holmes, 61 Conn. 1. Contra, Anderson v. Smith, 7 Ill. App. 354, containing an excellent discussion of the question where a valuable Irish setter was killed in defense of thoroughbred chickens. The killing of a trespassing dog in defense of fowls and geese has been considered justifiable: Leonard v. Wilkins, 9 Johns. 233; but not so in defense of cattle: Hinckley v. Emerson, 4 Cow. 351; 15 Am. Dec. 383. But one is never justified in going to excessive lengths in the defense of himself or his property from assault or injury. The method of defense adopted must bear a certain relation to the character or seriousness of the threatened injury: Anderson v. Smith, 7 Ill. App. 354. The fact that a dog is trespassing does not justify his wanton or malicious destruction: Ten Hopen v. Walker, 96 Mich. 236; 35 Am. St. Rep. 598; Brill v. Flagler, 23 Wend. 354; Wright v. Clark, 50 Vt. 130; 28 Am. Rep. 496. The law does not justify one in killing his neighbor's valuable dog because the animal has left tracks on his freshly painted porch, has been found on one occasion in his henhouse, and has come around his house at night, chased cats into the trees and barked: Bowers v. Horen, 93 Mich. 420; 32 Am. St. Rep. 513. Compare Dodson v. Mock, 4 Dev. & B. 146; 32 Am. Dec. 677; Brent v. Kimball, 60 Ill. 211; 14 Am. Rep. 35. The owner of domestic animals is justified in killing a trespassing dog whose conduct at the time is such as to raise a reasonable apprehension that he is about to harass, maim, or worry such animals: Marshall v. Blackshire, 44 Iowa, 475; but it is essential that the apprehension be a reasonable one: Livermore v. Batchelder, 141 Mass. 179. The defense of the owner's property must make the killing seem reasonably necessary: Harris v. Eaton, 20 R. I. 000; Brent v. Kimball, 60 Ill. 211; 14 Am. Rep. 35; Lipe v. Blackwelder, 25 Ill. App. 119. One is not justified in killing a dog merely because found in the company of other dogs which had previously been worrying his cattle, the dog in question having taken no part in such annoyance: Bar-

rett v. Utley, 12 Bush, 399; nor has a person a right to put out poisoned meat in his own inclosure for the purpose of killing the dogs of others merely because such dogs are trespassing on his premises: Gillum v. Sisson, 52 Mo. App. 516. Compare Dudley, 60 Mo. App. 420. One cannot justify killing another's dog by showing that he acted under the mistaken belief that the dog was a wolf: Ranson v. Kitner, 31 Ill. App. 241; and the killing of a dog engaged at the time in driving from his owner's premises cattle of the defendant trespassing thereon is indefensible, especially where the cattle received no more injury than was reasonably necessary under the circumstances: Spray v. Ammerman, 66 Ill. 309. In any case the question as to whether the defendant was justified in killing or injuring plaintiff's dog should be submitted to the jury, to be decided from a consideration of the peculiar facts and circumstances of the case: Lipe v. Blackwelder, 25 Ill. App. 119; Ranson v. Kitner, 31 Ill. App. 241; Livermore v. Batchelder, 141 Mass. 179; Hubbard v. Preston, 90 Mich. 221; 30 Am. St. Rep. 426; Ten Hopen v. Walker, 96 Mich. 236; 35 Am. St. Rep. 598; Leonard v. Wilkins, 9 Johns. 233; King v. Kline, 6 Pa. St. 318. Compare Dodson v. Mock, 4 Dev. & B. 146; 32 Am. Dec. 677.

Killing or Worrying Sheep as Defense in Action for Death or Injury of Dog.—Sheep raisers are especially subject to loss and annoyance from the predatory and wolfish instincts of dogs, and statutes have been quite generally enacted by states, in the exercise of their police power, to obviate such nuisance. In the absence of such statutes, however, the right of a person to defend his sheep from dogs, even to the extent of killing the dogs, is unquestioned. The Illinois statute authorizes any person who may discover any dog killing, wounding, or chasing sheep or discover such dog under circumstances that satisfactorily show that the dog has recently been so engaged, to immediately pursue and kill such dog: Brent v. Kimball, 60 Ill. 211; 14 Am. Rep. 35. It is not necessary that the dog be caught in the act of killing sheep, nor that his owner should have had notice of such killing: Carpenter v. Lippitt, 77 Mo. 242; Milman v. Shockley, 1 Houst. 444; contra, Johnson v. McConnell, 80 Cal. 545, where similar statutory provisions are construed. In Wisconsin, if a dog has killed or worried sheep, and its owner has been notified of the fact for twenty-four hours, any person may kill the dog if thereafter found out of the inclosure or immediate care of the owner or keeper; and a written notice is not required: Miller v. Spaulding, 41 Wis. 221. "It hath been always taken for the law, and universal usage is high evidence of law, that a sheep-stealing dog found lurking about or roaming over a man's premises where sheep are kept, incurs the penalty of death," says the court in Parrott v. Hartsfield, 4 Dev. & B. 110; 32 Am. Dec. 673; Hinckley v. Emerson, 4 Cow. 351; 15 Am. Dec. 383; Brown v. Hoburger, 52 Barb. 15; Brauer v. English, 21 Mo. App. 490; Leonard v. Wilkins, 9 Johns. 233. In an action for damages for killing a dog, his propensity to attack, worry, and kill sheep may be shown in mitigation of damages: Dunlap v. Snyder; 17 Barb. 561; Lentz v. Stroh, 6 Serg. & R. 34.

Liability of Railroad Companies and Carriers for Destruction of Dogs.

—In Jemison v. Southwestern R. R., 75 Ga. 444, 58 Am. Rep. 476, it was held that no action would lie against a railroad company for negligently killing a dog. In that case, however, it appears that the killing of the dog was unavoidable and not the result of negligence on the part of the company or its agents. The rule established in South Carolina, that a prima facie case of negligence is made out against a railroad company where it is shown that cattle pasturing on uninclosed lands are killed by a train of the company, is held not to apply where the animal killed is a dog: Wilson v. Wilmington etc. R. R. Co., 10 Rich. 52, where it is sarcastically said: "It would indeed be a startling doctrine to hold that a train of cars, whether freighted with produce or with passengers, and charged with the transportation of government mail, should be arrested in its progress, and compelled, at the hazard of responsibility, to come to a dead halt whenever a domestic fowl, or perchance a yelping cur, should happen to take its stand upon the track in defiance of the loud warning which is proclaimed by the motion of the train and the action of the machinery." Later cases have, however, held to a different doctrine. The employés of a railway company, upon discovering a dog upon the track, must exercise ordinary care and prudence to avoid doing him injury, and are not absolved from such duty by the fact that the dog's master may be guilty of trespass in bringing him upon the track: St. Louis etc. Ry. Co. v. Hanks, 78 Tex. 301. Where a train running through an incorporated city at an unlawful speed kills a dog which attempts to cross the track under the train, the question as to whether the injury was due to such unlawful speed should be submitted to the jury, and the burden is cast upon the defendant of showing that the injury was not so caused: Jones v. Illinois Cent. R. R. Co., 75 Miss. 970. A dog upon a street-car track is not a trespasser, and when a motorman discovers him there, he cannot rely upon the dog's quickness and celerity, and thus absolve himself from all duty and care to prevent an accident. The killing of the dog in such case, if it could have been avoided by the exercise of proper care and diligence, renders the company liable therefor: Citizen's Rapid Transit Co. v. Dew, 100 Tenn. 317; 66 Am. St. Rep. 754; though it has been said that when the employés of a railroad company discover a dog on the track, a presumption arises "that such dog has the instinct and ability to get out of the way of danger, and will do so unless its freedom of action is interfered with by other circumstances at the time and place": Jones v. Bond, 49 Fed. Rep. 281. Compare Melsch v. Rochester Electric Ry. Co., 72 Hun, 604. Dogs are within the contemplation of the statutes requiring signals to be given and precautions taken against accidents when "any person, animal, or other obstruction" appears upon a railroad track in front of its trains: Fink v. Evans, 95 Tenn. 413. The owner of a dog who has delivered it to the baggage master of a train and paid for its transportation may recover from the company for its negligent loss or destruction of the dog: Cantling v. Hannibal etc. R. R. Co., 54 Mo. 385; 14 Am. Rep. 476; Kansas City etc. R. R. Co. v. Higdon, 94 Ala. 286; 33 Am. St. Rep. 119. Compare Honeyman v. Oregon etc. R. R. Co., 13 Or.

352; 57 Am. Rep. 20, where it is held that a railway company, not undertaking to carry dogs, but permitting its servant, as an accommodation to passengers, to receive them for carriage and take pay therefor himself, cannot be held as a common carrier where the passenger had notice of the rule.

Larceny of Dogs.—There could be no larceny of a dog at common law: White v. Brantley, 37 Ala. 430; Ward v. State, 48 Ala. 161; 17 Am. Rep. 31; Haywood v. State, 41 Ark. 479; State v. Doe, 79 Ind. 9; 41 Am. Rep. 599; Mitchell v. Williams, 27 Ind. 62; State v. McDuffie, 34 N. H. 523; 69 Am. Dec. 516; State v. Holder, 81 N. C. 527; 31 Am. Rep. 517; Findley v. Bear, 8 Serg. & R. 571; State v. Marshall, 13 Tex. 55; monographic note to State v. Homes, 57 Am. Dec. 277. The reasons for the common-law rule were, as before stated, the base nature of property in dogs and the extreme penalty of death which visited one convicted of larceny. The latter reason was obviated in England by statute 10 George III, Chapter 18, called the "dog-stealing act": King v. Helps, 3 Maule & S. 331, which made the stealing of a dog larceny. In the United States, there has been a quite noticeable tendency, in legislation and judicial decisions, to recognize a complete property in dogs. In a number of states dogs have been made the subject of larceny by the courts through statutory construction. They have been considered "personal property" within statutes defining larceny: Harrington v. Miles 11 Kan. 481; 15 Am. Rep. 355; Mullaly v. People, 86 N. Y. 365; though this interpretation of the term has been disapproved: Ward v. State, 48 Ala. 161; 17 Am. Rep. 31; and dogs have been considered as not included within "personal goods": State v. Doe, 79 Ind. 9; 41 Am. Rep. 599. Where personal property is defined as "goods and chattels" in a statute defining larceny, a dog has been held a subject of larceny: State v. Brown, 9 Baxt. 53; 40 Am. Rep. 81, and note; Hamby v. Samson, 105 Iowa, 112; ante, p. 285; contra, Findlay v. Bear, 8 Serg. & R. 571; State v. Lymus, 26 Ohio St. 400; 20 Am. Rep. 772. In Texas, dogs have been held within the larceny statute as "domesticated animals": Hurley v. State, 30 Tex. App. 333; 28 Am. St. Rep. 916; but, as we have already seen, the cases are not in perfect accord as to whether or not a dog is a domestic animal, though the affirmative of the proposition is best supported. In other states, statutes making dogs subject to taxation have been construed as abrogating the common-law estimate of property in dogs and rendering them the subjects of larceny: Mullaly v. People, 86 N. Y. 364; Commonwealth v. Hazlewood, 84 Ky. 681. See Kinsman v. State, 77 Ind. 132; Harris v. Eaton, 20 R. I. ——; Commonwealth v. Depuy, 148 Pa. St. 201; but even as to this courts do not agree, some of them holding that such statutes are an exercise of the state's police power, not of its taxing power, and do not therefore recognize such a degree of property in dogs as to make them subjects of larceny: State v. Doe, 79 Ind. 9; 41 Am. Rep. 599; State v. Lymus, 26 Ohio St. 400; 20 Am. Rep. 772. See Ex parte Cooper, 3 Tex. App. 489; 30 Am. Rep. 152. In other states, dogs have been made personal property by statute, and at the present time it is settled by the great weight of American authority that dogs are subjects of larceny.

Various methods of enactment and interpretation, by legislatures and courts, have been used in establishing the rule, but of the final result there can be no doubt: Heisrodt v. Hackett, 34 Mich. 283; 22 Am. Rep. 529; Commonwealth v. Depuy, 148 Pa. St. 201; Johnson v. McConnell, 80 Cal. 545; State v. Mease, 69 Mo. App. 581; Jemison v. Southwestern R. R. Co., 75 Ga. 444; 58 Am. Rep. 476; Patton v. State, 93 Ga. 111.

Property in Dogs Subject to Police Power.—That property in dogs may be subjected to regulation by the state in the exercise of its police power cannot be questioned, but as to the course which such regulation may properly take, and as to its general effects, authorities are not in entire agreement, though, it should be said, not in serious disagreement. Such regulation usually runs in the direction of imposing license taxes upon the keeping of dogs, and it is well settled that the summary destruction of dogs may be authorized when such regulations are not complied with: Blair v. Forehand, 100 Mass. 136; 1 Am. Rep. 94; 97 Am. Dec. 82. The exercise of the police power is distinguishable from the exercise of the power of taxation in this connection, and the imposition of license taxes upon the owners of dogs may be sustained under the former, though under the latter they might be invalid because of inequality or lack of uniformity: Sentell v. New Orleans etc. R. R. Co., 166 U. S. 698; Mitchell v. Williams, 27 Ind. 62; State v. Cornwall, 27 Ind. 120; State v. Topeka, 36 Kan. 76; 59 Am. Rep. 529; Carthage v. Rhodes, 101 Mo. 175; Holst v. Roe, 39 Ohio St. 340; 48 Am. Rep. 459; Van Horn v. People, 46 Mich. 183; 41 Am. Rep. 159; Cole v. Hall, 103 Ill. 30; Tenney v. Lenz, 16 Wis. 566; Carter v. Dow, 16 Wis. 299. Such regulations may be free from constitutional objection, though the property of the owner is destroyed without notice or hearing, in the execution of the law: Julienne v. Jackson, 69 Miss. 34; 30 Am. St. Rep. 526; Hagerstown v. Witmer, 86 Md. 293; Morey v. Brown, 42 N. H. 373; Mowery v. Salisbury, 82 N. C. 175. In lieu of a license tax, statutes or ordinances are often passed seeking to prohibit dogs from running at large unless properly registered, or muzzled, or unless wearing a prescribed collar or tag. These regulations are upheld as within the police power, even though they authorize the summary destruction of dogs for violation of the law: Commonwealth v. Chase, 6 Cush. 248; Morey v. Brown, 42 N. H. 373; Nehr v. State, 35 Neb. 638; Jenkins v. Ballantyne, 8 Utah, 245; Hagerstown v. Witmer, 86 Md. 293; State v. Topeka, 36 Kan. 76; 59 Am. Rep. 529; Haller v. Sheridan, 27 Ind. 494; Julienne v. Jackson, 69 Miss. 34; 30 Am. St. Rep. 526. Contra, Mayor v. Meigs, 1 McAr. 53; 29 Am. Rep. 578; Lynn v. State, 33 Tex. Crim. Rep. 153.

Killing Unlicensed Dogs.—Under a statute authorizing "any person to kill any dog or dogs found or being without a collar," it is lawful to kill a dog if he is out of the inclosure of his owner without a collar, although under the immediate care of the owner, and this be known to the person killing the dog: Tower v. Tower, 18 Pick. 262. An unmuzzled dog is "running at large," and may be lawfully killed, though it had escaped confinement and was closely pursued by the owner: Julienne v. Jackson, 69 Miss. 34; 30 Am. St. Rep. 526; or

where he is on the public road, no one having control of him being near: Nehr v. State, 35 Neb. 638. But a dog at play with his owner's son upon his owner's land is not "at large": McAneary v. Jewett, 10 Allen, 151. Under a statute authorizing any person, and making it the duty of a peace officer, upon the request of any legal voter, to kill a dog going at large and not properly registered and collared, no one is authorized to enter a dwelling-house without the owner's leave to kill a dog: Bishop v. Fahay, 15 Gray, 61; Cozzens v. Nason, 109 Mass. 275; Morewood v. Wakefield, 133 Mass. 240; Kerr v. Seaver, 11 Allen, 151. Where a statute provides that no person shall be liable for killing any dog found without a proper collar, having the name of the owner thereon, actual notice of the ownership of a dog, found without such collar, will not make a person liable for killing him: Morey v. Brown, 42 N. H. 373. Such a statute does not authorize a person to convert any dog found without a collar. Cummings v. Perham, 1 Met. 555. And where a statute authorized "any person" to kill a dog going at large and not licensed and collared, it was held no defense, in an action to recover for the killing of plaintiff's dog by defendant's dog, that the former was not licensed and collared: Heisrodt v. Hackett, 34 Mich. 283; 22 Am. Rep. 529. A city marshal has no authority to kill unmuzzled dogs found running at large, where he acts simply upon orders from the mayor, and no ordinance has been passed giving him such power: Stebbins v. Mayer, 38 Kan. 573.

BIXBY *v.* OMAHA AND COUNCIL BLUFFS RAILWAY BRIDGE COMPANY.

[105 IOWA, 293.]

EVIDENCE.—MEDICAL BOOKS ARE NOT ADMISSIBLE in evidence, and it is not proper to permit them to be read to the jury, except that when a witness has referred to some medical authority to sustain his opinion, the authority to which he refers may be introduced in evidence to contradict him. This rule is not abrogated nor modified by the section of the code declaring that historical works, books of science and art, and published maps or charts, when made by a person indifferent between the parties, are presumptive evidence of facts of general notoriety or interest therein stated.

Wright & Baldwin, for the appellant.

Harl & McCabe, for the appellee.

294 LADD, J. This action is brought for injuries sustained by the plaintiff in a collision between a street-car of the defendant and a train on the Chicago, Burlington & Quincy Railroad. The liability of the defendant appears to have been conceded at the trial, and the extent of the injury and the amount to be allowed as damages were the only questions in controversy.

There was some contusion of the skin and bruises, but these soon disappeared, and at the time of the trial there was no objective or external evidence of any injury. The theory of the plaintiff was, that he had received a serious shock to his nervous system, and had symptoms indicating locomotor ataxia or some neurotic trouble. Dr. Barstow testified to such symptoms, while Drs. Jennings, Lacey, and Thomas insisted that there existed no signs of any disease. The plaintiff was permitted, over the objection of the defendant, to read in [295] evidence extracts from "Pepper's System of Medicine," volume 5, under the heads, "Tabes Dorsalis, Locomotor Ataxia," "Morbid Anatomy," and "Physiology"; from a work by Dr. Ranney, under the heads "Nerve Cells and Nerve Fibres," "Spinal Neurasthenia"; from a work by Dr. Hirt, entitled "Diseases of the General Nervous System," under the heads "Functional Neurosis," "Diseases of the Pneumogastric Nerve," and "Affections of the Air Passage Due to the Lesions of the Vagus"; also extracts from a lecture by S. Weir Mitchell on "Permanent Headache," and from a lecture by Dr. H. B. Wood on "The Remote Effects of Traumatism, as Seen by the Neurologist." These works were admitted to be standard, but had not been quoted or cited as authorities by the physicians in giving their testimony. The portions read to the jury treated of the symptoms, and not the cure, of diseases, and might be fairly well understood by those somewhat acquainted with the nomenclature of the medical profession. These extracts cover twenty-four pages of the abstract, and it is impractical to set them out. While they might aid the educated physician to a better understanding of the matters discussed, we are satisfied their tendency was to mislead and confuse the jury. A person of ordinary comprehension could not understand much of the language used, and would be in great danger of being misled by the grouping of symptoms. The learning of these works, if extracted by a skilled physician and applied to the particular case, and thus brought within the comprehension of the jurors, would doubtless have been of great assistance in ascertaining the true condition of the plaintiff. But as they assume a technical knowledge on the part of the reader, and capacity to understand the relative importance to be attached to symptoms, we think they could not be safely left to their interpretation and inferences. As [296] said by Chief Justice Shaw in Ashworth v. Kittridge, 12 Cush. 193, 59 Am. Dec. 178: "Medical science has its own nomenclature, its technical terms and words of art, and also com-

mon words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author; whereas, a medical witness would not only give the fact of his opinion and the grounds on which it is formed, with the sanction of his oath, but would also state and explain it in the language intelligible to men of common experience." The question is not whether the courts will use the helps of science in the investigation of truth. There is no controversy on that score. The authorities are agreed that the truths of the exact sciences, the established facts of history, and computations from fixed data may be proven by the works of reputable authors: Worden v. Humeston etc. Ry. Co., 76 Iowa, 310; Gorman v. Minnesota etc. Ry. Co., 78 Iowa, 509; Scagel v. Chicago etc. Ry. Co., 83 Iowa, 380; Schell v. Plumb, 55 N. Y. 598; Mills v. Catlin, 22 Vt. 98. This is on the ground that all men assent to their correctness. But medicine belongs to the class known as inductive sciences. The data is constantly shifting with new discoveries, and the conclusion which may be considered sound to-day is repudiated to-morrow. A medical work may be standard this year and obsolete next. The opinion of the same author changes in the different editions, owing to new discoveries and a better understanding of symptoms. The very best works, aside from observations, are largely made up of the opinions either of the author or of others compiled. It is a well-known fact that physicians, after research and investigation, often differ radically. [297] It was said in Clark v. State, 12 Ohio, 483, 40 Am. Dec. 481, where the sanity of the defendant was involved, that "whenever they have enlisted on the side of either party, or of some favorite theory, and one portion of the profession is placed in array against another, the difficulties mentioned in the passage above quoted are greatly multiplied, and, however honest or renowned for professional character the witnesses may be, such will be the conflict of their testimony, in nine cases out of ten, that it will be utterly unsafe for a jury or court to follow or adopt the conclusions of either side." If those learned in medicine are often unable to determine from the books the nature and extent of injuries and diseases, how shall the laymen be better informed by an examination of them? The situation emphasizes the necessity of cross-examination and the use of an oath, not only that the

theory contained in the books may be known and understood, but that practical skill may apply the science of medicine to each case. As said, not the use of the inductive sciences in the investigation of truths, but the manner—the vehicle, as it were —by which the results of research shall be conveyed to the court and jury is involved. We think the safer practice is to rely upon the testimony of living witnesses of the medical profession, who may bring the learning and research of the books within the comprehension of the jurors, and the truths of science to the facts in each particular case. Indeed, the advocates of a contrary rule generally admit the necessity of additional safeguards, which may only be provided by legislation: See article by John Henry Wigmore in 26 American Law Review, 390. The language of the supreme court of Michigan in People v. Hall, 48 Mich. 482; 42 Am. Rep. 477, is so pertinent that we quote it with approval: "Scientific or expert testimony must be given by living witnesses who can be cross-examined [298] concerning their means of knowledge, and can explain in language open to general comprehension what is necessary for the jury to know. The only legal reason for allowing the evidence of opinions is found in the presumption that an ordinary juryman or other person without special knowledge could not understand the bearing of facts that need interpretation. Medical books are not addressed to common readers, but require particular knowledge to understand them. Everyone knows the inability of ordinary persons to understand or discriminate between symptoms or groups of symptoms, which cannot always be described to those who have not seen them, and which, with slight changes and combinations, mean something very different from what they mean in other cases. The cases must be very rare in which any but an educated physician could understand detached passages at all, or know how much credit was due to either the author in general or to particular parts of his book. If jurors could be safely trusted with the interpretation of such books, it is hard to see on what principles witnesses would be required. Scientific men are supposed to be able, by their study and experience, to give the general results accepted by the scientific world, and the extent of their knowledge is tested by their personal examination. But the continued changes of view brought about by new discoveries in most matters of science, and the necessary assumptions by scientific writers of some technical knowledge in their readers, render the use of such works before juries—especially in detached portions

and selected passages—not only misleading, but dangerous. The weight of authority, as well as of reason, is against their reception." The exclusion of such evidence is approved on substantially the same grounds by the following among many authorities: Johnston v. Richmond etc. R. R. Co., 95 Ga. 685; Fowler [299] v. Lewis, 25 Tex. Supp. 380; Melvin v. Easley, 46 N. C. 386; 62 Am. Dec. 171; State v. O'Brien, 7 R. I. 336; Epps v. State, 102 Ind. 539; Boyle v. State, 57 Wis. 472; 46 Am. Rep. 41; Regina v. Taylor, 13 Cox. C. C. 77; Ware v. Ware, 8 Me. 42; Tucker v. Donald, 60 Miss. 460; 45 Am. Rep. 416; Ordway v. Haynes, 50 N. H. 159; Huffman v. Click, 77 N. C. 55; Payson v. Everett, 12 Minn. 217; Collier v. Simpson, 4 Car. & P. 73; Harris v. Panama R. R. Co., 3 Bosw. 7.

Our conclusion is somewhat opposed to language contained in Bowman v. Woods, 1 G. Greene, 441. In that case a physician was sued for malpractice in an accouchement case, and in defense set up that he had followed the botanic system of practicing medicine. It appears the plaintff so knew in employing the defendant, and physicians were called to show that his treatment was in accordance with that system. They referred to certain standard works on botanic medicine, from which they claimed to have derived much of their professional knowledge. Such books are held admissible. If a physician is employed to treat a patient according to a certain system, and he does so, exercising ordinary skill therein, he has fulfilled his obligation. Now, in determining whether he has in fact followed that system, the books from which physicians of that school are shown to have derived their knowledge may be admissible, for these expound the very principles which he is alleged to have violated; and certainly, under such circumstances, the books themselves would be better evidence than quotations from them. In such a case, a physician might refer to an author as justifying his conclusion that the treatment was or was not in accordance with his system, and as said in this case: "Being permitted to refer to and quote authors, we can see no good reason why they may not read the views and opinions of distinguished [300] authors. The opinions of an author, as contained in his works, we regard as better evidence than the mere statement of those opinions by a witness, who testified as to his recollection of them." The reasoning does not apply to a case where the school or system is not involved; for it is not the rule to permit the physician to quote from medical works: See Boyle v. State, 57 Wis. 472; 46 Am. Rep. 41; Commonwealth v. Sturtivant, 117 Mass. 122;

19 Am. Rep. 401; Ashworth v. Kittridge, 12 Cush. 193; 59 Am. Dec. 178; Marshall v. Brown, 50 Mich. 148; People v. Wheeler, 60 Cal. 581; 44 Am. Rep. 70; Collier v. Simpson, 5 Car. & P. 73. It seems, however, that, where the witness has referred to some medical authority to sustain the opinion he has expressed, that authority may be introduced in evidence for the purpose of contradicting him: Pinney v. Cahill, 48 Mich. 584; Ripon v. Bittel, 30 Wis. 619; Bloomington v. Shrock, 110 Ill. 219; 51 Am. Rep. 678. See contra, Davis v. State, 38 Md. 15. In State v. Howard, 10 Iowa, 101, the only point decided is that a medical work cannot be taken to a jury room. In Donaldson v. Mississippi etc. Ry. Co., 18 Iowa, 280; 87 Am. Dec. 391, the Carlisle tables are admitted on the strength of the ruling in Bowman's case. In Broadhead v. Wiltse, 35 Iowa, 429, it is held that section 4618 of the code adopted after the decision in the Bowman case, was not restrictive in its effect, and rendered no evidence inadmissible which was admissible before, and that standard medical authorities are not the best evidence of what they teach, as was intimated in Bowman's case. In Quackenbush v. Chicago etc. Ry. Co., 73 Iowa, 458, the objection to the extract offered was that it was too indefinite, and this was overruled. In Peck v. Hutchinson, 88 Iowa, 320, the objection was simply that the medical work offered was an old edition, and its introduction was held to be without prejudice. We do not think Bowman's case decisive of the question now before us, [301] and certainly no other can be so construed. In Alabama alone are medical works received in evidence: Stoudenmeier v. Williamson, 29 Ala. 558, followed in the subsequent cases of Merkle v. State, 37 Ala. 139, and Bales v. State, 63 Ala. 30. In the first of the above the issue involved the breach of warranty in the sale of a slave. That the objections to the admissibility of such evidence are not answered is evident from the following quotation, which is not inconsistent with the rule we adopt: "The brief period of human life will not allow one man, from actual observation and experience, to acquire a complete knowledge of the human system and its diseases. Professional knowledge is in a great degree derived from the books of the particular profession. In every step the practitioner takes, he is, perhaps, somewhat guided by the opinions of his predecessors. His own scientific knowledge is, from the necessities of the case, materially formed and molded by the experience and learning of others. Indeed, much of the knowledge we have upon all subjects, except objects of sense, is derived from

books and our associations with men. It is the boast of this age of advancing civilization that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the courtroom? We think not."

The appellee insists these treatises were admissible under section 4618 of the code, which is as follows: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest therein stated." As said in Broadhead v. Wiltse, 35 Iowa, 429, the purpose of the legislature was to extend the rule of evidence rather than to restrict it. This extension is [302] limited, however, by the words, "facts of general notoriety or interest therein stated." The supreme court of California, in construing a statute identical with ours, except the last two words are omitted, used this language: "What are facts of general notoriety and interest? We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature, existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause, that, under the provisions of the code, proof may be made by the production of books of standard authority. Such facts include the meaning of words and allusions which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences, founded upon conclusions reached from certain and constant data, by processes too intricate to be elucidated by witnesses when on examination": Gallagher v. Market Street Ry. Co., 67 Cal. 13; 56 Am. Rep. 713. We think this the correct interpretation of this section, and that it does not authorize the admission of medical treatises. This identical question was before the United States circuit court of appeals for this circuit in Union Pac. Ry. Co. v. Yates, 79 Fed. Rep. 584, and in a clear and exhaustive opinion a like conclusion was reached. See, also, Van Skike v. Potter, 53 Neb. 28. The exceptions to the other rulings on the admissibility of evidence are without merit. The other errors assigned are not likely to arise upon another trial.

Reversed.

EVIDENCE—MEDICAL BOOKS.—Medical books cannot be read to a jury against the objection of the other side, even if it be said that only such works of good and established authority should be read: Ashworth v. Kittridge, 12 Cush. 193; 59 Am. Dec. 178. But it is held that if experts refer to particular medical works as authority for certain propositions, such books may be read in evidence for the purpose of discrediting their testimony: See monographic note to Ashworth v. Kittridge, 59 Am. Dec. 183. See Stilling v. Thorp, 54 Wis. 528; 41 Am. Rep. 60, and note, extended note to Bloomington v. Shrock, 51 Am. Rep. 680-683.

HOLLENBECK *v.* RISTINE.

[105 IOWA, 488.]

LIBEL—WORDS NOT ACTIONABLE PER SE.—An untrue and malicious charge published in printing or writing is actionable when damages are shown to have resulted therefrom as a natural and probable consequence thereof, although the words used are not actionable per se.

LIBEL.—To publish of one that he has for several years owed medical services, and, on being sued therefor, pleaded the statute of limitations, is actionable, if the charge is false and the publication results in his being discharged from his employment and the consequent loss of the means of support.

AN ACCOUNT STATED is prima facie, but not conclusive, evidence of the accuracy and correctness of the charges stated therein.

ACCOUNT STATED.—The retention of an account, rendered without objection within a reasonable time, affords presumptive evidence of the correctness of such account, but it is for the jury to determine from all the evidence submitted to them whether there was such acquiescence by lapse of time as that there was an account stated, and, if there was, whether the items of the account were correct.

LIBEL.—STATEMENTS AS TO ONE'S INTEGRITY AND FITNESS FOR A TRUST in which he is employed, whether they are mere expressions of opinion or not, are actionable if the criticism is founded upon false statements of matters of fact.

LIBEL—PRIVILEGED COMMUNICATIONS—MALICE.—A libelous communication cannot be privileged if actuated by malice.

LIBEL.—If there is evidence tending to prove that the plaintiff was discharged from his employment solely by reason of a libelous communication addressed by the defendant to the plaintiff's employer, the jury should be left to determine the cause of such discharge.

LIBEL—ACTION FOR WORDS NOT DEFAMATORY.—Though words published of a person are not, in contemplation of law, defamatory, yet if he who published them intentionally thereby caused loss or damage to another without justifiable cause and with malicious purpose, the person thus injured may recover in an action of tort the damages sustained as the natural and proximate result of the wrong.

Action for libel founded upon a letter written by the defendant to the president of the Cedar Rapids & Marion City Railway Company. The writing of the letter was admitted, but it was

claimed to be justified as privileged. The jury was instructed by the trial court to return a verdict for the defendant, the plaintiff appealed.

Henry Rickel, John T. Christie, and Jamison & Smith, for the appellant.

C. D. Harrison and Hubbard, Dawley & Wheeler, for the appellee.

489 DEEMER, C. J. The alleged libelous publication of which plaintiff complains is the same one recently considered by this court in the case of Hollenbeck v. Hall, 103 Iowa, 214, 64 Am. St. Rep. 175, and need not be set out in extenso. We held in that case that the publication was not libelous per se. The only difference between that case and this is, that in this plaintiff alleged and produced evidence tending to show that the defendant wrote a letter to Hall, who was president and manager of the Cedar Rapids & Marion City Railway, with intent to injure plaintff, and to induce Hall to discharge him from the service of that company; that he had theretofore been in the employ of the company as a conductor for many years; and that, by the writing of said letter, plaintiff has been injured in his means of support, deprived of his employment, and lost valuable 490 time by reason of his discharge. This, as we understand it, is a plea for special damages; and the question at the threshhold of the case is, whether or not plaintiff can recover special damages resulting from the publication of a letter which is not libelous per se. It has been broadly stated that "all words are actionable if special damage follows": Moore v. Meagher, 1 Taunt. 39; Barnes v. Trundy, 31 Me. 321; Comyn's Digest, tit. "Action for defamation," D, 30. Again, it has been said that "special damages will not help you if the words are not defamatory": Blackburn, J., in Young v. Macrae, 7 L. T., N. S., 354; 3 Best & S. 264. To the same effect is Sheahan v. Ahearne, 9 I. R. C. L. 412. We apprehend that between these two statements is to be found the correct rule. Townshend, in hs work on Libel and Slander, fourth edition, section 197, says: "It may be correct to say that, to make the words wrongful, they must in their nature be defamatory; provided, the rule thus expressed be understood as being subordinate to and implied in the more comprehensive rule, that to render actionable that language which is not actionable per se, the language must occasion special damage, in the proper sense of that

term"; that is to say, as we understand it, the damage must be the natural and proximate, although not the necessary, consequences of the wrongful act complained of. Townshend further says: "The real question must always be, Was the damage complained of the natural and proximate consequences of the publication?" Judge Cooley, in his work on Torts, second edition, page 242, says: "Besides the publications mentioned [referring to those libelous per se], any untrue and malicious charge which is published in writing or print is libelous when damage as shown to have resulted as a natural and proximate consequence." This we regard as a correct statement of the rule, and it seems to be sustained by the [491] authorities: Scholl v. Bradstreet Co., 85 Iowa, 551; Morrasse v. Brochu, 151 Mass. 567; 21 Am. St. Rep. 474; Odgers on Slander and Libel, 89, 92, and cases cited. If it be conceded, however, that there cannot be an action for libel unless the words are defamatory, still plaintiff may be entitled to relief under the allegations of his petition, although he may call it an action for libel. If one intentionally cause temporal loss or damage to another without justifiable cause and with malicious purpose to inflict it, that other may recover, in an action of tort, the damages he has sustained as a natural and proximate result of the wrong: Walker v. Cronin, 107 Mass. 555; Lucke v. Clothing Cutters' etc. Assembly, 77 Md. 396; 39 Am. St. Rep. 421; Chipley v. Atkinson, 23 Fla. 206; 11 Am. St. Rep. 367. The name that plaintiff has given his action is of no consequence, provided he has stated sufficient facts to show a right of recovery. We are firmly of the opinion that the petition stated a cause of action, and that the plaintiff introduced sufficient evidence to warrant the court in submitting the case to the jury, unless it be for some of the matters hereinafter considered.

2. Defendant pleaded that the statements made in the letter were true, and that the publication was justifiable. We think this was a fair question for the jury. Plaintiff adduced evidence tending to show that he had paid defendant all that he owed prior to the time the letter was written, and that he did not interpose the plea of the statute of limitations as charged. It is well settled that the justification must be as broad as the charge, and of the very charge. Surely, there was evidence to go to the jury on this issue.

3. One of the grounds of the motion to direct a verdict was, that the evidence showed an account stated [492] between the parties, and that this was conclusive on the question of indebt-

edness. The claim is founded upon the fact that defendant sent his bill to plaintiff, who retained it beyond a reasonable time without objection. It is generally, and we believe correctly, held that an account stated is not conclusive, but is prima facie, evidence of the accuracy and correctness of the items; and the strength of the presumption of correctness depends to some extent upon the circumstances of the case. In the case of White v. Hampton, 10 Iowa, 238, we said: "What will amount to a stated account from the presumed acquiescence of the parties arising from lapse of time, and their failure to object to the same within a reasonable period, must depend upon circumstances to be judged of by the nature of the transaction and the habits of business and course of trade." It was a fair question for the jury to determine whether there was such acquiescence by lapse of time as that there was an account stated, and, if there was, whether the items of the account were correct.

4. It is said that the statements in the letter with reference to plaintiff's integrity and fitness for his trust were mere expressions of opinion, and therefore not actionable. We do not think this is true; but, if true, the criticism must be founded on fact: Townshend on Slander and Libel, sec. 257.

5. Again, it is insisted that the communication was privileged, because directed to a person who was interested in knowing the conduct of plaintiff. The communication, if privileged at all, was conditionally privileged; that is to say, it must have been made in good faith, believing the statements to be true, or having probable cause to believe them to be true. If he who published was actuated by malice, there was no privilege. There was, as we have [493] already stated, evidence tending to show actual malice on the part of the defendant, and the trial court was in error in sustaining the motion upon the ground of privilege. We are not to be understood as affirming either that the truth was a defense, or that the communication was conditionally privileged; on these points we express no opinion, as they are not now involved. We simply say that, assuming these propositions to be true, still the court was in error in directing a verdict for the reasons heretofore given.

6. There was evidence tending to show that plaintiff was discharged solely by reason of the letter written by defendant to Hall, and the case should have been submitted to the jury for their conclusion on the question as to the cause of discharge.

Other assignments of error are discussed by counsel, but,

as the questions are not likely to arise upon a retrial, we will not consider them. What we have said sufficiently indicates our views upon the controlling points in the case, and we conclude by saying that the case should have gone to the jury under proper instructions from the court.

Reversed.

LIBEL—ACTIONABLE—WHAT IS.—Any publication injurious to the social character of another and not shown to be true, or to have been justifiably made, is actionable as a false and malicious libel: Collins v. Dispatch Pub. Co., 152 Pa. St. 187; 34 Am. St. Rep. 636, and note. Words may be libelous though they do not defame a man in the ordinary sense, or impute blame, or moral turpitude, or even censure, as when they affect one in his business by imputing incapacity or unfitness for its proper management: Moore v. Francis, 121 N. Y. 199; 18 Am. St. Rep. 810, and note; Stewart v. Minnesota Tribune Co., 40 Minn. 101; 12 Am. St. Rep. 696, and note; or to prejudice him in his employment: Obaugh v. Finn, 4 Ark. 110; 37 Am. Dec. 773. See Hollenbeck v. Hall, 103 Iowa, 214; 64 Am. St. Rep. 175, where the publication complained of was similar to that set forth in the principal case.

ACCOUNTS—PRESUMPTION.—An account rendered to which no objection is made after a reasonable time allowed for examination, is taken in law to be prima facie correct. This presumption may be overcome by proof: First Nat. Bank v. Allen, 100 Ala. 476; 46 Am. St. Rep. 80, and note; monographic note to Bell v. Hudson, 2 Am. St. Rep. 802.

LIBEL—PRIVILEGED COMMUNICATION—WHEN ACTIONABLE.—A privileged communication is actionable only when express malice is shown to have instigated it, or such gross disregard of the rights of the person injured as is equivalent to malice in fact: Bradstreet Co. v. Gill, 72 Tex. 115; 13 Am. St. Rep. 768, and note; Sherwood v. Powell, 61 Minn. 479; 52 Am. St. Rep. 614; Jackson v. Pittsburg Times, 152 Pa. St. 406; 34 Am. St. Rep. 659.

BENTON COUNTY SAVINGS BANK v. BODDICKER.

[105 IOWA, 548.]

BONDS—DELIVERY OF CONTRARY TO AGREEMENT.—A surety on a bond cannot successfully defend against it by showing that he signed it under an agreement that it was not to be delivered unless other parties also became sureties thereon, if he does not further show that the obligee, before acting upon the bond, had notice of such agreement.

SURETIES—WHEN MAY NOT ASSERT THAT AN INSTRUMENT IS INCOMPLETE.—Where sureties have placed in the hands of their principal an instrument which purports to be valid and complete, they are estopped to assert, as against an innocent holder for value, that they did not execute the instrument and that it was not to be delivered unless additional parties also became sureties thereon.

SURETY—RELEASE OF BY THE CONDUCT OF THE OBLIGEE.—The obligee, in dealing with a surety, must observe the utmost good faith, and, failing to do so, he will be discharged to the extent to which he suffers by reason of the lack of good faith

on the part of the obligee. Hence, if the surety applies to the obligee for information respecting the financial standing of his principal, and the obligee makes false statements in reply, in consequence of which the surety forbore to take measures to save himself from loss, he is discharged to the extent to which he has suffered from the misstatements of the obligee.

SURETIES—WHEN LIABLE FOR RENEWALS.—If a bond is conditioned that the obligee shall be protected against all loss by failure of the principal to pay indebtedness now owing, or which may be contracted hereafter to the obligee, the sureties are liable for the nonpayment of renewals of existing debts, as well as for those which otherwise accrued.

BONDS—CONSIDERATION FOR.—A bond conditioned for the payment of all existing indebtedness of the principal and all indebtedness which may accrue is based upon a sufficient consideration, where it appears that the creation of new indebtedness was contemplated and actually took place after the execution of the bond.

CORPORATIONS—LOANS GRANTED IN EXCESS OF THE SUM PERMITTED BY STATUTE.—Though a statute declares that the total liability of a corporation to anyone for moneys borrowed shall not exceed twenty per cent of the capital stock, a surety for the payment of debts existing and to be incurred in favor of the corporation cannot escape liability on the ground that the debts for which he has become answerable aggregate more than such twenty per cent.

SURETY ON BOND—NOTICE OF CONDITION.—If a surety signs a bond and delivers it to his principal, with the condition that it is not to be delivered to the obligee unless other persons also become sureties thereon, and it is delivered in violation of this condition, express notice to the obligee of the condition is not essential to release the surety. It is sufficient if the surety proves knowledge by the obligee of such facts as would have caused a person of reasonable prudence to investigate and discover that the delivery was not authorized.

Action upon a bond. Verdict and judgment for the plaintiff; the defendants appealed.

Heins & Heins, for the appellant.

Tom H. Milner, for the appellee.

549 ROBINSON, J. In January, 1881, the plaintiff was organized as a corporation by virtue of chapter 60 of the acts of the fifteenth general assembly, for the purpose of transacting business as a savings bank at Norway, in Benton county. Its capital stock, at first but ten thousand dollars, was, in the year 1887, increased to fifteen thousand dollars. The firm of G. A. Miller & 550 Sons was engaged at Norway in selling coal, lumber, and agricultural implements, and borrowed money of the plaintiff. In the first part of the year 1891 the firm was indebted to the plaintiff to the amount of about six thousand dollars, and upon the demand of the plaintiff executed and deliv-

ered to it the instrument in suit, of which the following is a copy: "Know all men by these presents that we, G. A. Miller & Sons, as principals, and Joseph Boddicker and V. A. Thoman, as sureties, of Benton county, Iowa, are held and firmly bound unto the Benton County Savings Bank of Norway, Benton county, Iowa, in the sum of five thousand ($5,000) dollars, to be paid to the said Benton County Savings Bank or its assigns; to the payment of which we bind ourselves, and each of us, our heirs and legal representatives, firmly by these presents. It is the intention and purpose of this instrument or obligation to fully protect and indemnify the said Benton County Savings Bank or its assigns against any and all losses by reason of the failure of the said G. A. Miller & Sons to pay their indebtedness now owing (or which may be contracted hereafter) to the said Benton County Savings Bank. The condition of the above obligation is such that, if the said G. A. Miller & Sons shall pay the full amount of their indebtedness to the said Benton County Savings Bank, then this obligation to be void and of none effect; otherwise to remain in full force and virtue.

"G. A. MILLER & SONS.
"JOSEPH BODDICKER.
"V. A. THOMAN."

On the thirty-first day of January, 1896, the plaintiff commenced this action against the firm of G. A. Miller & Co. and its members to recover the amount due on certain promissory notes, and against the sureties to recover the amount of the bond. The action was aided by attachment which was issued against the property of the firm and its members. In April, 1896, judgment [531] was rendered against all the defendants excepting the sureties on the bond, for the sum of fourteen thousand six hundred and twenty dollars and fifty-five cents, an attorney's fee, and costs, and a special execution was ordered against certain town lots. Thereafter, by order of the court, a separate petition setting out the claims of the plaintiff upon the bond was filed, and to that the sureties Boddicker and Thoman filed an answer. The verdict and judgment against them were for the full amount of the bond.

1. The defendants claim that each of them signed the bond upon the express condition that before it should be delivered and take effect it should also be signed by three other men of good financial responsibility; also that Boddicker signed the bond on that condition, and notified the plaintiff of that fact before the bond was delivered, and that Thoman signed after Bod-

dicker did, and relying upon his signature. There was evidence which tended to support these claims. The court charged the jury that the burden was on the defendants to show that the plaintiff had knowledge or notice of the condition on which the bond was signed, if it was signed on the condition alleged, before it was delivered, or before any credits had been extended or benefits conferred by virtue thereof; and of that portion of the charge the appellants complain. The answer alleges that the plaintiff had the knowledge or notice specified before the bond was delivered, but the appellants insist that upon proof of the fact that the bond was executed on the condition stated a presumption that the plaintiff took the bond with knowledge of the condition was created, and that the burden of rebutting that presumption, and showing that the bond was taken in good faith, was upon the plaintiff. It is a rule of general application that the holder of negotiable paper which is payable to bearer or [552] is indorsed in blank is presumed to be its bona fide owner, but that, when fraud or other illegality in the inception of the paper is shown, the burden is shifted to the holder to show that he acquired and holds it in good faith: Union Nat. Bank v. Barber, 56 Iowa, 559, and authorities therein cited; Bank of Montrose v. Anderson Bros. Min. etc. Co., 65 Iowa, 692, 701; Lane v. Krekle, 22 Iowa, 399; Bennett State Bank v. Schloesser, 101 Iowa, 571; First Nat. Bank v. Holan, 63 Minn. 525; Bank of Montreal v. Richter, 55 Minn. 362; 1 Am. & Eng. Ency. of Law, 2d ed., 369; Tiedeman on Commercial Paper, sec. 303. And when an alteration in an indorser's contract is shown, the burden is on the holder of the note to show the sufficiency of the indorsement: Robinson v. Reed, 46 Iowa, 219. The rule of these cases applies, notwithstanding the fact that in actions by persons not payees of such paper it is necessary to plead in defense that the plaintiffs are not good faith holders of the paper in suit: Lane v. Krekle, 22 Iowa, 399; Sillyman v. King, 36 Iowa, 207, 214. These rules have been applied to purchasers of real property whose titles were assailed: Rush v. Mitchell, 71 Iowa, 333; Gardner v. Early, 72 Iowa, 518; Merrill v. Tobin, 82 Iowa, 529; Sillyman v. King, 36 Iowa, 207. In this case there has not been any transfer of the instrument alleged to have been wrongfully delivered, and it is not a negotiable instrument. Therefore, the rules which protect the bona fide owners of negotiable instruments are not in all respects applicable. We cannot, however, assent to the claim of the defendants that, if the bond in

suit was delivered in violation of an agreement to the effect that it should not be delivered until three additional sureties should sign it, no recovery can be had thereon, even though the plaintiff took it without knowledge or notice of the agreement. The case of Johnston v. Cole, 102 Iowa, 109, involved the validity of a contractor's bond, on which [553] recovery was sought against a surety named Cole. He pleaded as a defense that the bond was not to be delivered unless it should be signed by another surety, and the jury found specially that he did not deliver the bond nor authorize its delivery without the signature of another surety. We held, under the issues tendered and the special finding, that the invalidity of the bond had been established, and called attention to the fact that the issues did not bring in question the legal effect of the delivery made; and that the answer pleaded an affirmative defense, the sufficiency of which was not in any manner questioned. Whether the bona fide holder of such a bond might, in any event, be entitled to recover upon it as against the surety who had not authorized its delivery, and upon whom rested the burden of proof as to the good faith of the holder, were questions not decided in that case. In Daniels v. Gower, 54 Iowa, 319, a recovery was sought against the sureties on a non-negotiable promissory note. Three of the sureties signed the note when it was in the hands of one Stoller, with the agreement that it should not be delivered unless the signature of one Blajok should be obtained. It was held that if Stoller was not the agent of the plaintiff, and the note was delivered without the knowledge and consent of the three sureties, in violation of the condition upon which it had been placed in the hands of Stoller, the sureties would not be liable. The correctness of that decision was questioned in Taylor County v. King, 73 Iowa, 153, 5 Am. St. Rep. 666, and the fact was pointed out that it rested in part upon the supposed authority of Pepper v. State, 22 Ind. 399, 85 Am. Dec. 430, which has been overruled in State v. Pepper, 31 Ind. 76, and in part upon the case of Ayres v. Milroy, 53 Mo. 516, 14 Am. Rep. 465, which was examined and questioned, if not distinguished, in State v. Potter, 63 Mo. 212; 21 Am. Rep. 440. The case of People v. Bostwick, 32 N. Y. 445, tends to sustain the doctrine of Daniels v. Gower, 54 Iowa, 319, but was questioned in [554] Russell v. Freer, 56 N. Y. 67, although it was cited in Whitford v. Laidler, 94 N. Y. 145; 46 Am. Rep. 131. In some cases, a distinction has been suggested between official bonds and other non-negotiable instruments, based upon grounds of public pol-

icy: Carroll County v. Ruggles, 69 Iowa, 269; 58 Am. Rep. 223; Taylor County v. King, 73 Iowa, 153; 5 Am. St. Rep. 666. But, although there are a few authorities which support the rule of Daniels v. Gower, 54 Iowa, 319, the greater number do not: See Butler v. United States, 21 Wall. 272; Dair v. Same, 16 Wall. 1; White v. Duggan, 140 Mass. 18; 54 Am. Rep. 437; Ordinary v. Thatcher, 41 N. J. L. 403; 32 Am. Rep. 225; Quick v. Milligan, 108 Ind. 419; 58 Am. Rep. 49; Russell v. Freer, 56 N. Y. 67; State v. Peck, 53 Me. 284; State v. Pepper, 31 Ind. 76; McCormick v. Bay City, 23 Mich. 457; Millett v. Parker, 2 Met. (Ky.) 608; State v. Potter, 63 Mo. 212; 21 Am. Rep. 440, and cases therein cited; Cutler v. Roberts, 7 Neb. 4; 29 Am. Rep. 371; Nash v. Fugate, 32 Gratt. 595; 34 Am. Rep. 780; Jordan v. Jordan, 10 Lea, 124; 43 Am. Rep. 294; Tidball v. Halley, 48 Cal. 613; Chicago v. Gage, 95 Ill. 613; 35 Am. Rep. 182. The ground upon which some of these decisions are based is, that where sureties have placed in the hands of their principal an instrument which purports to be valid and complete, they are estopped to assert, as against an innocent holder for value, that they did not execute it. In this case, if the testimony for the plaintiff be credible, the defendants executed what purported to be a valid bond, complete excepting that the names of the sureties were not inserted, and intrusted it to the principal. He delivered it wrongfully, it is said, but the plaintiff had no knowledge of that fact, nor of any circumstances which should have caused it to inquire as to the condition on which the bond was signed. We do not think that, in the absence of such knowledge, the plaintiff refrained at its peril from making inquiry as to the signing of the bond. It is a rule of general application that when one of two innocent 555 parties must suffer loss it should fall upon the one whose acts caused it: Quick v. Milligan, 108 Ind. 419; 58 Am. Rep. 49. We reach the conclusion that the doctrine of Daniels v. Gower, 54 Iowa, 319, which we have considered, is contrary to reason and the weight of authority, and so far as the case announces that doctrine it is overruled. If it be shown that the bond was delivered by the principal in violation of the condition on which it was signed by the sureties, nevertheless the plaintiff may recover if it show that it received the bond in good faith, for a sufficient consideration, without knowledge or notice of the condition upon which the defendants signed it.

2. The defendants state that, being ignorant of the financial standing of G. A. Miller & Sons, they applied to the plaintiff,

a short time before this action was commenced, for information, and were then assured by the plaintiff that the firm was solvent, and in good financial condition; that the plaintiff knew that the statements were false; that the defendants believed them to be true, and relied upon them, and in consequence refrained from taking measures to secure themselves which they would have taken but for the false representations made as stated. In view of the fact that what evidence will be given on another trial of this case is uncertain, we content ourselves with saying on this branch of the case that as the contract of suretyship is, as a rule, for the benefit of the creditor, he is, in dealing with the surety, to observe the utmost good faith, and if he fail to do so, without a sufficient excuse for his neglect, the surety will be discharged to the extent to which he suffers by reason of the lack of good faith on the part of the creditor. If the surety applies to the creditor for information respecting the principal which the creditor has, and may properly give, but which he withholds without sufficient cause, or if he knowingly give false information, he, and not 556 the surety, should suffer the loss occasioned by the wrong: See Bank of Monroe v. Anderson Bros. Min. etc. Co., 65 Iowa, 692; Rowley v. Jewett, 56 Iowa, 492; Auchampaugh v. Schmidt, 77 Iowa, 13; Wolf v. Madden, 82 Iowa, 114; Harris v. Brooks, 21 Pick. 195; 32 Am. Dec. 254; Brandt on Suretyship and Guaranty, 611.

3. The evidence tended to show that the time of paying some of the indebtedness of G. A. Miller & Sons which existed when the bond in suit was given was afterward extended, and that new indebtedness was thereafter contracted; and it is insisted that the bond does not cover either class of indebtedness. The bond, in terms, covers the indebtedness of the firm which it owed to the plaintiff at the time the bond was given, or which should be thereafter contracted. It is true, the third paragraph of the bond recited that the condition of the bond is that the firm "shall pay the full amount of their indebtedness" to the plaintiff, and that paragraph, taken alone, might well be said to refer only to indebtedness existing when the bond was given; but all the provisions of the bond must be construed together, and when that is done it is clear that the bond was intended to secure the payment of the indebtedness of the firm to the plaintiff which existed at the time the bond was given, and also that which should be created by contract thereafter. The provisions were sufficiently broad to include renewals of existing debts, as well as those which should otherwise accrue, for

a continuance of the business of the firm was evidently contemplated, and the contracts for the extension of existing debts were as much within the scope and purpose of the bond as were those which should be thereafter created. We do not think that the case of Crapo v. Brown, 40 Iowa, 487, nor other authorities cited by the appellants, are in conflict with the conclusion we reach, as [557] each was made to depend upon the terms of the obligation construed, and none were like the bond in suit.

4. It is urged that there was no consideration for the bond, but without sufficient reason. Although G. A. Miller & Sons were owing more than the amount of the bond when it was given, yet it applied to future as well as to existing indebtedness, and the evidence shows that new debts were contracted after the bond was given. It is also said that the debts the firm was permitted to incur were largely in excess of the amount permitted by the bond; but that did not purport to limit the amount of indebtedness the principal might incur, but only the amount which the bond should secure.

5. Section 18 of chapter 60 of the acts of the fifteenth general assembly provides that "the total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities a company or firm, the liabilities of the several members thereof, shall at no time exceed twenty per cent of the capital stock actually paid in; provided, that the discount of bona fide bills of exchange drawn against actually existing value and the discount of commercial or business paper actually owned by the person or persons, corporation, or firm negotiating the same shall not be considered money borrowed." As the capital stock of the plaintiff was but fifteen thousand dollars, the amount of the bond was two thousand dollars in excess of the sum which the plaintiff was authorized to lend to the firm, and the amount of its debts to the plaintiff when this action was commenced was nearly five times that which it was authorized to borrow of the plaintiff. It is argued that the firm and the plaintiff violated the law in creating the debt, and that the sureties are thereby discharged. It is true that every [558] contract must be construed with respect to the law applicable to it, and that contracts in violation of law are void; but it does not appear that the bond was designed to accomplish or to promote an illegal purpose. It was not restricted to indebtedness which should have been or should be thereafter incurred for borrowed money, and the prohibition of the statute is against liabilities for money borrowed. It will

be noticed that the statute does not make a loan of money in excess of the per centum named void, and the general rule applicable to loans of that character is that they are not void, the prohibition of the statute being intended as a rule for the government of the bank: Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640; Mills County Nat. Bank v. Perry, 72 Iowa, 15; 2 Am. St. Rep. 228; Pangborn v. Westlake, 36 Iowa, 546; Bank of Cadiz v. Slemmons, 34 Ohio St. 142; 32 Am. Rep. 364; Atlantic State Bank v. Savery, 82 N. Y. 291; Duncomb v. New York etc. R. R. Co., 84 N. Y. 190; O'Hare v. Second Nat. Bank, 77 Pa. St. 96; Farmington Sav. Bank v. Fall, 71 Me. 49; 27 Am. & Eng. Ency. of Law, 380, 381. Since it does not appear that the bond was given for an illegal purpose, and the plaintiff can enforce as against G. A. Miller & Sons the full amount of their debts, we are of the opinion that the defendants may be liable in this action for the full amount of the bond in suit.

6. The twelfth paragraph of the charge given by the court in effect authorized the jury to find for the plaintiff, even though the bond was delivered in violation of the condition on which it was signed by the defendants, if the plaintiff did not have "express notice" that its delivery was unauthorized. We think that in giving that portion of the charge the court erred. If the bond was delivered in violation of the condition on which the defendants signed it, knowledge of such facts as would have caused a person of reasonable prudence to investigate and discover that the delivery was not authorized would have been sufficient [559] to charge the plaintiff with notice that the bond was illegal. The conclusions we have expressed dispose of the controlling questions presented for our consideration and of those which are likely to arise on another trial.

For the errors which we have pointed out, the judgment of the district court is reversed.

SURETYSHIP — DELIVERY OF BOND CONTRARY TO AGREEMENT—EFFECT ON SURETY.—If a surety signs and delivers to his principal an instrument perfect on its face, with a condition that it is not to be delivered to the obligee, payee, or grantee until some person or persons who are agreed upon shall execute it, and the principal delivers the instrument without regard to the condition, and without knowledge thereof on the part of the obligee, payee, or grantee, the delivery binds the surety: Carter v. Moulton, 51 Kan. 9; 37 Am. St. Rep. 259, and note. It is otherwise if the obligee has notice of such condition and of its violation, or if he has notice of facts which suggest an inquiry which, being properly prosecuted, would have given him the requisite knowledge: State v. Allen, 69 Miss. 508; 30 Am. St. Rep. 563,

and note; extended note to Sharp v. United States, 28 Am. Dec. 679-681.

SURETYSHIP—RELEASE OF SURETY BY FRAUD OR CONCEALMENT OF OBLIGEEE.—Noncommunication by a creditor to a surety of material facts within the knowledge of the former and which the latter should know, although not willful or intentional on the part of the creditor, discharges the surety: Jungk v. Holbrook, 15 Utah, 198; 62 Am. St. Rep. 921, and note. If he knows, or has good grounds for believing that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good faith and fair dealing demand that he should make such disclosures to him; if he accept the contract without doing so, the surety may afterward avoid it: See monographic note to Fassnacht v. Emsing Gagen Co., 63 Am. St. Rep. 333.

Block & Pollak Iron Company *v.* Holcomb-Brown Iron Company.

[105 Iowa, 624.]

JUDGMENT AGAINST A CESTUI QUE TRUST—LIEN OF AGAINST PURCHASERS WITHOUT NOTICE.—A judgment against a person for whose benefit another holds the legal title to lands is not a lien against a subsequent bona fide purchaser from the trustee without notice of the trust.

EVIDENCE—BURDEN OF PROOF—INNOCENT PURCHASER.—As a general rule, the burden of proving that one is an innocent purchaser without notice of prior equities is on the purchaser, yet when a subsequent purchaser proves his purchase and payment for the land, the onus shifts to the person asserting the equity or encumbrance to show notice thereof to the purchaser.

Suit to declare a judgment in favor of the plaintiff to be a lien on certain lands, and to subject them to the payment of such judgment. Decree in favor of the defendant; the plaintiff appealed.

Smyth & Lewald, for the appellant.

E. S. Huston, for the appellees.

625 DEEMER, C. J. The defendant in judgment is the Holcomb-Brown Iron Company. It never had legal title to the lands. Claim is made that it at all times was the equitable owner, and that plaintiff's judgment is or should be made a lien thereon. John F. Holcomb held the legal title from January 27, 1891, to June 3, 1892, when he conveyed to Fleming as trustee. The deed was made to secure about four thousand dollars of the indebtedness of the Holcomb-Brown Iron Company

to Richard Brown, the National State Bank, and others. In May of 1894, Holcomb quitclaimed the property to Brown, and Fleming, trustee, conveyed to him, June 12, 1894, by special warranty deed reciting that Holcomb had conveyed, and requested him to; and, the [626] trust being satisfied, he accordingly did so. On June 23, 1894, Brown conveyed to Joyce, Hamilton, and others, the expressed consideration being thirty thousand dollars. This was paid by the delivery of thirty thousand dollars of stock in the Western Iron & Steel Company to Brown. The grantees in the Brown deed were promoters of this last-named company, which is a corporation. Appellant's judgment was rendered March 3, 1894.

We are satisfied that Holcomb held the property in trust for the benefit of the Holcomb-Brown Company, and that the conveyances to Fleming, trustee, and to Brown, were made to secure the creditors of that corporation, among whom were the National State Bank and Brown himself, who, it appears, had made large advancements to the corporation. We are further convinced that Brown conveyed to Joyce and others, in consideration of thirty thousand dollars in stock in the Western Iron & Steel Company, and that, while he may have held the property in trust, yet, when appellees purchased, the records disclosed absolute title in Brown, and that the trust impressed upon the land by the conveyance to Fleming had been discharged. It is clear that when Holcomb conveyed to Fleming as trustee there was no lien upon the land, and, as this conveyance was made for the benefit of the bank, Brown, and others, the conveyances by Holcomb and Fleming, the trustee, were in execution of that trust, and related back to the making of the original trust deed. Brown's interest was, therefore, prior and superior to the lien of plaintiff's judgment, conceding such judgment to have been a lien from the time of its rendition.

As no question is made regarding the bona fides of the indebtedness to the bank or to Brown, it is clear that Brown, if he held the title, would be entitled to [627] have his claim, whatever it may be, preferred over that of the appellant: Anglo-American etc. Agency Co. v. Bush, 84 Iowa, 272. But, as Brown knew that the property belonged in equity to the Holcomb-Brown Iron Company, when he took his conveyance, the appellant's judgment, when recovered, would, as to him, be a lien upon the property. When appellees Joyce, Hamilton, and others purchased the property, the records showed the legal title to be in Brown. A judgment rendered against the Holcomb-

Brown Iron Company while Brown held the legal title would not be a lien against the property in such sense as to charge subsequent bona fide purchasers without notice: Hultz v. Zollars, 39 Iowa, 589; Stadler v. Allen, 44 Iowa, 198. Campbell, Evans, and Hamilton each testified that he did not know of plaintiff's claim or judgment, and did not know that the Holcomb-Brown Company ever owned any interest in the property, or made any claim thereto. Joyce withdrew his appearance, and default was entered as to him; but there is no showing of any knowledge on his part of appellant's claim, or of the equitable ownership of the Holcomb-Brown Company. In the case of Farmer's Nat. Bank v. Fletcher, 44 Iowa, 252, it is said: "Whoever purchases real property of the person holding the legal title, and takes a conveyance of the property without notice of outstanding equities, and pays a valuable consideration, takes it divested of such equities, and, of course, of all liens on such equities." The conveyance to Joyce and others was evidently in trust for the corporation of which they were promoters, and this corporation is now the beneficial owner of the property. There is no evidence of notice to any of these promoters—indeed, the contrary appears—and no evidence that the corporation had any notice whatever. "While, as a general rule, the burden of proving that one is an innocent purchaser without notice of prior equities is upon the purchaser, [628] yet, when the subsequent purchaser has proved his purchase, and payment for the land, the onus is shifted to the person asserting the equity or encumbrance to show notice thereof to the purchaser; that is, either actual notice or knowledge of such facts as would put an ordinarily prudent man upon inquiry, which, if followed up, would have led to the discovery of the equity or encumbrance": Jones on Real Property, sec. 1526, and cases cited. Appellant has entirely failed to produce such evidence, and defendants' title should be protected.

Affirmed.

TRUSTS—JUDGMENT AGAINST BENEFICIARY.—A judgment against a cestui que trust, the trustee not being a party, does not bind him, and he, in an action that seeks to subject the trust estate to the satisfaction of that judgment, may contest its correctness and show that it is void: Roberts v. Yancey, 94 Ky. 243; 42 Am. St. Rep. 357, and note. See Lebeck v. Fort Payne Bank, 115 Ala. 447; ante, p. 51.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—PRESUMPTION.—The great weight of authority clearly establishes the doctrine that one claiming title to land by a deed to him purporting to be made for a valuable consideration is presumed to be a purchaser in good faith without notice of prior unrecorded deeds,

until the contrary is shown; and that the burden of proof to show notice and want of good faith is on the party attacking the deed: Extended note to Anthony v. Wheeler, 17 Am. St. Rep. 288.

CEDAR RAPIDS PUMP COMPANY *v.* MILLER.

[105 IOWA, 674.]

EXECUTION.—THE LEVYING UPON AND TAKING POSSESSION OF BOOKS OF ACCOUNT confers no interest in the accounts themselves, and if a person to whom the levying officer delivers the books, for the purpose of collecting the accounts shown therein, actually collects some of them, the moneys so collected remain the property of the judgment debtor, and are subject to execution against him.

EXECUTION—CUSTODY OF THE LAW.—A valid levy is essential to place property in the custody of the law. Hence, if a sheriff levies upon account-books of the judgment debtor without garnishing the persons from whom such accounts are due, and one to whom the sheriff delivers such books collects some of the accounts shown therein, the moneys so collected are not in custody of law, and hence are subject to garnishment on a writ against the judgment debtor.

Proceeding against a garnishee under a writ issued in favor of G. H. Miller & Sons by the Cedar Rapids Pump Company. In this action an attachment was issued under which the Benton County Savings Bank of Norway was garnished as a debtor of the defendants. Judgment was given against the garnishee, and it thereafter appealed.

Tom H. Milner, for the appellant.

W. L. Crissman and C. D. Harrison, for the appellee.

[674] GIVEN, J. 1. The following facts appear in the answer of the garnishee, and a stipulation made by the [675] parties: Prior to the issuing of the attachment in this case, intervenor had commenced an action in the district court of Benton county against G. A. Miller & Sons to recover fourteen thousand dollars, and caused an attachment to issue therein, and to be placed in the hands of S. H. Metcalf, sheriff of Benton county, for service. Prior to the service of said notice of garnishment in this case, said sheriff levied the attachment in his hands upon the book accounts of Miller & Sons, and took the books containing the same into his possession. Thereafter the sheriff turned over said books to appellant, for the purpose of collecting the accounts and taking care of the books. Before the service of garnishment, appellant had collected on said accounts, and had in its possession, two hundred and sixty-seven dollars and eleven

cents, for which it thereafter gave the sheriff a certificate of deposit. None of the persons from whom said collections had been made were garnished, and the only thing done by the sheriff in making the levy was to take possession of the books containing the accounts.

2. If the two hundred and sixty-seven dollars and eleven cents were in the custody of the law, by reason of the levy of appellant's attachment, then the superior court had no jurisdiction over it. Appellant's contention is, that by levying upon and taking possession of the books, the sheriff acquired legal custody of the accounts therein that were collected, and the right to collect the same, and that appellant's possession was as bailee for the sheriff. Appellee's contention is, that the levy conferred no right or interest in the accounts, but simply in the material composing the books, and that, therefore, neither the accounts nor the money collected thereon were in the custody of the law. In other words, we have the question whether this levy on the account books was a levy on the debts charged therein. Section 2967 [676] of the code of 1873 is as follows:

"Sec. 2967. What may be Attached and How Done.—Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows: 1. By giving the defendant in the action, if found within the county, and also the person accompanying or in possession of the property, if it be in the hands of a third person, notice of attachment; 2. If the property is capable of manual delivery, the sheriff must take it into his custody if it can be found; 3. Stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached; 4. Debts due the defendant, or property of his held by third persons and which cannot be found, or the title to which is doubtful, are attached by garnishment thereof." The sheriff could take manual possession of the books, but not of the debts due to Miller & Sons. They could only be attached by garnishment. To make a legal levy, "the officer should do that which will amount to a change of possession, or something that will be equivalent to a claim of dominion, coupled with a power to exercise it": Crawford v. Newell, 23 Iowa, 453. There was no change in the possession of, or dominion over these debts—nothing that gave the sheriff or appellant power to exercise dominion over them, or to prevent the debtors from

paying to Miller & Sons. The statute is specific in providing how attachments may be made when the property is not capable of manual delivery, or cannot be found, and that "debts due the defendant are attached by garnishment": See Osborn v. Cloud, 23 Iowa, 104; 92 Am. Dec. 413; Ochiltree v. Missouri etc. R. R. Co., 49 Iowa, 150; 2 Freeman on Executions, 2d ed., sec. 262; Waples on Attachment, 169; Goodbar v. Lindsley, 51 Ark. 380; 14 Am. St. Rep. 54. [677] These authorities are all to the effect that a levy upon books of account is not a levy upon the debts charged therein, due by others to the defendant in attachment or execution. It follows from this conclusion that neither the accounts, nor the money collected thereon, were in the custody of the law, nor of the district court of Benton county, and that the superior court had jurisdiction thereof, and to render the judgment that it did.

Affirmed.

EXECUTION—PROPERTY IN CUSTODIA LEGIS.—Money collected by an officer on legal process, while it remains in his hands, is to be regarded as in the custody of law and not the subject of levy or attachment in any form: Hardy v. Tilton, 68 Me. 195; 28 Am. Rep. 34, and note; extended note to Shinn v. Zimmerman, 55 Am. Dec. 264, 265. Property unlawfully taken is not in the custody of the law: Gilman v. Williams, 7 Wis. 329; 76 Am. Dec. 219.

CASES

IN THE

SUPREME COURT

OF

MARYLAND.

CROOK *v.* GIRARD IRON AND METAL CO.

[87 MARYLAND, 138.]

CORPORATIONS, FOREIGN, JURISDICTION OVER.—So long as a corporation confines its operation to the state in which it was created, it cannot be sued in another state in which it has no office and transacts no business, by serving process on its president or other officer temporarily within that state.

CORPORATIONS—JURISDICTION.—A FOREIGN corporation which has done no business within a state, except to purchase some machinery at a sheriff's sale, has not engaged in business therein, so as to authorize the service of process to be made upon one of its officers temporarily within the state.

Robert H. Smith and Daniel L. Brinton, for the appellant.

Isidor Raynor, and Richard H. Worthington, for the appellee.

139 ROBERTS, J. This is an action of replevin brought by the appellant against the appellee to recover the possession of a lot of electrical machinery. The appellant is a citizen of the state of Maryland; the appellee is a body corporate of the state of New Jersey. The appellee, in June, 1896, purchased at sheriff's sale in Baltimore City the above-mentioned machinery and paid cash for the same. After the sale and delivery of said machinery, the appellant, claiming that he had purchased the same from the appellee and was entitled to the possession thereof, sued out the writ of replevin and took possession of the goods in dispute. The writ having been served upon Mr. Ginsburg, the agent of the appellee, it appeared in the court below for the sole purpose of filing a motion to quash the writ of summons and to set aside the return of the sheriff, assigning reason

therefor that it was a corporation, not chartered by the laws of this state, and did not hold and exercise franchises in this state at the time of the service of the writ issued in this case.

There is but one question arising on this appeal which will be necessary for us to consider and determine, and that relates solely to the right of the appellant to maintain this action under the state of case which the record presents. In the view which we entertain of the disposition which should be made of the motion to quash, it will not be requisite to pass upon any other question in the record, for the reason that if no legal service of the writ of replevin has been made upon the appellee, it will be useless to consider any other question in the case. The character of the question before us has been sufficiently indicated in what we have already [140] said. The decisions upon this question are by no means uniform; to the contrary, they are somewhat confused. But we think the decided weight of authority is in favor of the proposition that so long as a corporation confines its operations to the state in which it was created, it cannot be sued in a state where it has no office or transacts no business by serving process on its president or other officer, when temporarily present within such state: Thompson in Corporations, sec. 7994; Moulin v. Trenton Mut. etc. Ins. Co., 24 N. J. L. 222; Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. L. 15; United States v. American Bell Teleph. Co., 29 Fed. Rep. 17.

The provisions of the code which relate to this subject are sections 295, 296, and 297 of article 23. For the purpose of this opinion it will only be necessary to quote the language of section 295, which reads as follows: "Any corporation not chartered by the laws of this state, which shall transact business therein, shall be deemed to hold and exercise franchises within this state and shall be liable to suit in any of the courts of this state, on any dealings or transactions therein." It is conceded that the appellee is a foreign corporation, having no place of business within this state, and that it has, so far as the record discloses, had no dealings or transactions in this state other than the purchase by it of the electrical machinery hereinbefore mentioned. Upon this state of facts has the appellant a legal right to maintain this action by making service of the writ upon the agent of the appellee, who was, at the time of such service, temporarily within the state of Maryland? In determining the liability of a corporation to process and action within a state foreign to its creation, it is oftentimes important to ascertain the extent and character of the dealings or transactions had or done

within such state. This question was considered in the case of Clews v. Woodstock Iron Co., 44 Fed. Rep. 31, in which there was, as in this case, a motion to set aside service of the summons and to quash the writ for the reasons assigned in this case. The facts in that [141] case are briefly these: a foreign corporation which had done no business in New York beyond negotiating a mortgage on its property, and having the bonds secured thereby put on the list of the New York stock exchange, was served with summons by service of the writ upon its president, who was temporarily in the state of New York attending to other business matters, including the negotiation of said mortgage. The court held that the corporation was not engaged in business in that state, and that no jurisdiction over it was acquired by service of summons on its president while temporarily in that state for the purposes named: Also Good Hope Co. v. Railway etc. Co., 22 Fed. Rep. 635; Moulin v. Trenton Mut. etc. Ins. Co., 24 N. J. L. 224; Phillips v. Burlington Library Co., 141 Pa. St. 462; 23 Am. St. Rep. 304; United States Graphite Co. v. Pacific Graphite Co., 68 Fed. Rep. 442; St. Clair v. Cox, 106 U. S. 350.

From a careful examination of the case presented by the record, we find nothing therein which we deem necessary to further consider or pass upon. Concurring in the ruling of the court below, we affirm the same.

Ruling affirmed with costs.

CORPORATIONS—FOREIGN—SUITS AGAINST—DOING BUSINESS.—Whether a corporation can be sued in a state of which it is not a resident depends upon the position in which it has seen fit to place itself in reference to that state in connection with the laws thereof: Reyer v. Odd Fellows etc. Assn., 157 Mass. 367; 34 Am. St. Rep. 288. Process may be served on a foreign corporation in this state if it is doing business here, and the action arises out of such business: Aldrich v. Anchor Coal Co., 24 Or. 32; 41 Am. St. Rep. 831; monographic note to De La Montanya v. De La Montanya, 53 Am. St. Rep. 182. For various acts held not to be the doing of business within a state by a foreign corporation, see Florsheim etc. Dry Goods Co. v. Lester, 60 Ark. 120; 46 Am. St. Rep. 162, and note; Commercial Bank v. Sherman, 28 Or. 573; 52 Am. St. Rep. 811. Compare State v. Bristol Savings Bank, 108 Ala. 3; 54 Am. St. Rep. 141.

REIDEL *v.* PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY.

[87 MARYLAND, 153.]

NEGLIGENCE IN RUNNING TRAINS FASTER THAN PERMITTED BY MUNICIPAL ORDINANCE.—The violation of a municipal ordinance regulating the speed of railway trains is not such negligence per se as will afford a right of action. The person injured must have been in a position to entitle him to the protection that the ordinance was designed to afford, and he must show how and under what circumstances the duty arose to him personally, and how it was violated by the negligence of the defendant, to his injury.

RAILWAYS—UNLAWFUL SPEED OF TRAINS—CONTRIBUTORY NEGLIGENCE.—Though a person trespassing on a railway track is injured by a train running within the limits of a municipality at a rate of speed forbidden by the ordinance, he must, to entitle him to recover, prove that his injury was caused by the rate of speed without any direct contributory negligence on the part of himself. The negligence of the railway company in disregarding the ordinance does not excuse, nor in any way justify, negligence on the part of the person injured.

NEGLIGENCE, CONTRIBUTORY, FACTS ESTABLISHING.—One attempting to cross a railway on a dark evening where were several tracks side by side, on three of which were rows of cars standing, and who looked for, but did not see, two trains approaching from opposite directions, and stepping between the tracks on which they were running, was injured by them, must be adjudged guilty of contributory negligence when he must have heard or seen the trains had he used his senses.

Albert Constable, James J. Arthur, and William F. Kurtz, for the appellant.

L. M. Haines and Thomas H. Robinson, for the appellee.

154 FOWLER, J. This is an action to recover damages for injuries to the plaintiff alleged to have been caused by the negligence of the defendant railroad company on the evening of December 28, 1891, at Wilmington, Delaware. The suit was commenced in the circuit court of Cecil county on the 5th of December, 1894. On the 14th of January following, the declaration was filed. The case appears to have been continued by consent from term to term until the 25th of March, 1897, when the plaintiff filed a suggestion and affidavit for removal, and the record was thereupon sent to the circuit court for Kent county. On the 20th of April following, the defendant filed a suggestion for removal, and the record was accordingly sent to the circuit court for Harford county and was filed there on the 26th of April, 1897, and the trial was commenced in that court on the 8th of June of the same year, and on the 11th of the

same month the learned judge below instructed the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover. On the 23d of June judgment on the verdict was entered, and the same day the defendant appealed.

The sole question involved in this appeal is whether the jury were properly instructed to find a verdict for the defendant. We think the learned judge below was quite right in taking the case from the jury.

The general principles which must govern the decision of this case are well settled in this state, and it is unnecessary, therefore, to look for authorities in other states, however interesting and instructive they may be. A number of those cited by the appellant, notably those reported in 89, 107, and 175 Pennsylvania State Reports, are cases which relate to [155] the principles which are well settled in reference to injuries inflicted by a railroad company at public crossings. Such adjudications have no application to the case before us, for when injured the plaintiff was, and is conceded to have been, a trespasser on the track of the defendant company, where it had "the exclusive right of way for the operation of its trains": Baltimore etc. R. R. Co. v. State, 69 Md. 555.

But inasmuch as the legal sufficiency of the evidence is questioned it will be necessary to examine it. Only two witnesses testify in regard to the facts of the accident, the plaintiff and the witness Woerner, who testified in his behalf. It appears that the injury complained of was received at Wilmington, in Delaware, while the plaintiff was in the act of crossing the tracks of the Philadelphia, Wilmington, and Baltimore Railroad Company at the foot of Second street in that city. He was at the time of the injury and had been for some years employed by it as a night laborer at its roundhouse. According to his own testimony on the 28th of December, 1891, he left his home in Wilmington about quarter before 6 o'clock in the evening for his work, passed along Second street in the same way he had always done during all the time he had worked for the company, and when he came near to the end of that street, which terminates at the railway of the defendant, there being no crossing there, he stopped and looked up and down the railroad to the right and left, but did not see or hear anything. He then walked toward the railroad and crossed the first three sidetracks, and when he passed out from behind some freight-cars on one of the sidetracks, he again looked up and down the railroad, but neither saw nor heard anything. He then walked across the

first main or south-bound track, and was in the act of stepping on the north-bound track when he saw a train approaching him on that track and going toward Philadelphia. When he first saw this train it was nearly upon him, or, as he says, about a car's length distant from him, and running at a speed, according [156] to his testimony, of from ten to twelve miles an hour. Upon seeing this train he drew back to let it pass, and before he could escape another train running at a speed of twenty miles an hour appeared on the southbound track, and he stood in the space between the two tracks trying to make himself "slim." But he was knocked down and seriously injured—whether by the north or southbound train he does not say. It appears that both trains reached the spot where he was standing about the same time. The night, he says, was cold and dark. He heard no whistles or bells from either train. However, he qualifies this by saying he was too excited; and didn't know anything that was going on around him, which under the circumstances was but natural. It appears from the testimony that quite a number of employés of the defendant were in the habit of walking across the tracks at the foot of Second street going to and returning from their work at the defendant's roundhouse, but this does not alter the factthat the plaintiff was a trespasser: Philadelphia etc. R. R. Co. v. Stebbing, 62 Md. 517; Baltimore etc. R. R. v. State, 62 Md. 487; 50 Am. Rep. 233. It has been suggested that the plaintiff was an employé of the defendant, and if so, he might be subjected to the rule pertaining to the rights of fellow-servants, and for this reason, if for no other, he could not recover; but this defense was not relied on by the defendant and we will not, therefore, consider it.

The remaining testimony relating to the facts of the accident is that of Anthon Woerner, a fellow workman of the plaintiff, who, according to his testimony, must have reached the end of Second street about the time the plaintiff started to cross the tracks. He was late in getting to his work—the hour he was required to be there being 6 o'clock. He also was in the habit of crossing at the foot of Second street, and on this occasion he said he ran and tried to get over before the northbound train came up, because he had heard the 6 o'clock whistle, but there was a car there and it was impossible for him to cross. He heard the whistle of the northbound train before he got [157] to the railroad tracks, and about the time he got there he heard the whistle of the southbound train. He was fortunately too late, in his opinion, to attempt to cross before the northbound

train came up. On cross-examination, he said that as soon as he got to the corner he heard the southbound train coming in, and it was coming very fast, in his opinion at the rate of twelve or fifteen miles an hour. Some one called his attention to a man who was on the track and in danger, whereupon he looked through some cars standing on the sidetracks, and saw, as he says, "only the man by his legs and his dinner kettle." This witness confirms the plaintiff's testimony that the trains met where the plaintiff was standing—the one going south running, as he supposed, about twice as fast as the one going north, the speed of the latter being six or eight miles an hour. He thinks the southbound train was three hundred or three hundred and fifty feet up the track when it whistled, but he appears to have heard the train coming as soon as he arrived at the crossing. Both of these witnesses were examined and cross-examined at much length, but we have given enough of their testimony to show that notwithstanding the defendant appears to have given the ordinary signals, yet it was guilty of negligence in violating the ordinance of the city of Wilmington by running, on this occasion, one, if not both of its trains, at a speed greater than was allowed by ordinance within the city limits.

It is settled law that in all such cases as this the violation of a municipal ordinance regulating the speed of trains within certain limits is not per se such negligence as will afford a right of action. The person injured "must have been in a position to entitle him to the protection that the ordinance was designed to afford, and he must show how and under what circumstances the duty arose to him personally, and how it was violated by the negligence of the defendant to his injury": Philadelphia etc. R. R. Co. v. Stebbing, 62 Md. 517. It is quite immaterial to the case of the plaintiff that the defendant company was guilty of violating the ordinance "unless it be [158] shown that the injury complained of was occasioned by such unauthorized speed of the train, without any direct contributory negligence on the part of the plaintiff himself." If it appears that he knew, or could have known by the exercise of his powers of observation, either by sight or hearing, of the near approach of the trains in time to get out of the way of danger, and failed to do so, he has no right of action, notwithstanding the violation by the defendant of the ordinance. This rule was applied by Chief Justice Alvey in the case just cited in clear and forcible language. And that same eminent judge in the more recent case of the Baltimore etc. R. R. Co. v. State, 69 Md. 554, in de-

livering the opinion of this court, again reiterated and enforced the rule applicable to trespassers who are injured on the tracks of a railroad. In that case it is said: "It is true the train was running at a much higher rate of speed than that allowed by the ordinance of the city, and in this, it is conceded, there was negligence. But this disregard of the ordinance, and consequent act of negligence on the part of the defendant, did not excuse or in any way justify the glaring act of negligence on the part of the deceased. That has been ruled in many cases and is now the settled law." The conduct which we characterized in the case just cited as a glaring act of negligence, consisted in walking in open daylight on the track of the railroad, facing an approaching train. But in State v. Baltimore etc. R. R. Co., 58 Md. 485, the opinion of the court having also been delivered by Chief Judge Alvey, the facts were more like the present case. There the time of the accident was night, as here, and the persons injured were, as here also, trespassers, and, as we have said, were there assuming all the risks of the perilous position in which they had voluntarily placed themselves, there being no duty imposed upon the defendant's employé on the train to keep a lookout for them. Under these circumstances, we said, "the night being dark, they must have known that they could not depend for their safety upon being seen by those in charge of the train, beyond the reflection of the headlight. [159] They knew perfectly well that their safety depended alone upon the use of their senses and the exercise of a proper degree of caution. It is difficult to suppose they did not see the approaching train with its glaring headlight confronting them in time to enable them to step from the track. If the deceased did see or hear the approaching train in time and failed to get out of the way, he was certainly guilty of the grossest negligence, and if he did not see or hear the approaching train, it must have been because he did not use his senses for his protection, and he was therefore guilty of negligence, and that negligence directly contributed to the cause of his death."

Now, what are the facts of this case? As we have seen, the plaintiff on a dark evening in December attempted to cross the defendant's tracks at a place where the moment he stepped upon them he became, in contemplation of law, a trespasser. He says there were three rows of cars standing on the sidetracks, and he went behind those cars, and stood there and looked up and down to see if he could see a train, and, seeing nothing, he walked across the two rails of the southbound track, and just as he put

his foot on the northbound track he saw the train for Baltimore about a car's length distant from him; he stepped back into the space between the two tracks, and was then between the two trains—both going by him at the same time. He was then in a most dangerous position, but he was there by his own fault. It is apparent from the proximity of the trains to the plaintiff as he put his foot upon the rails of the northbound track, that if he had made proper use of his senses he must have seen or heard the trains. He says he looked and did not see, but it is impossible for him not to have seen or heard one train or the other—for they were there, and if he did not see or hear them it is his misfortune. "If he did not see or hear the approaching train, it must have been because he did not use his senses": State v. Baltimore etc. R. R. Co., 58 Md. 485. It seems to us the conduct of the plaintiff was reckless. His knowledge of the locality should have persuaded him, and would [160] have, we think, induced any prudent man to have waited until he could by looking, or, if he could not see, by listening, convince himself that no trains were approaching. If it be conceded that it be possible that he did not and could not see the approaching trains, yet that he did not hear them is incredible. He must have heard, but he did not heed. The plaintiff, like others who were in the habit of crossing at the place, had become so familiar with its dangers that they no longer had any effect upon him. It appears that one of the witnesses was in the habit of getting over the cars which stood on the sidetracks and thus obstructed his way across the defendant's road. Familiarity with danger has, in this case, had its usual effect, and the plaintiff had the misfortune of being added to the long list of those who become reckless of their own safety by daily contact with perils, which in others would inspire fear, caution, and prudence.

In the view we have taken the remaining exceptions, based upon the refusal to admit the testimony of the witness Moreland, become unimportant, for our conclusion is based upon the conceded fact that the defendant was guilty of negligence in running its train at a greater speed than allowed by the ordinance, and, as we understand it, the rejected testimony was offered to show that there was such a violation of the ordinance.

Judgment affirmed with costs.

RAILROAD COMPANIES—UNLAWFUL SPEED—CONTRIBUTORY NEGLIGENCE.—The general rule is, that if a breach of statute is relied upon by the plaintiff as a cause of action, he must show not only that he is one of the class for whose benefit the

statute created a duty, but also that the breach of the statute is the proximate cause of the injury; and a similar rule is applied where the injury is alleged to have occurred on account of the unlawful speed of the train: See monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 817, 818. See Spillane v. Missouri Pac. Ry. Co., 135 Mo. 414; 58 Am. St. Rep. 580; Lederman v. Pennsylvania R. R. Co., 165 Pa. St. 118; 44 Am. St. Rep. 644, and note. Contributory negligence of plaintiff, when constituting the proximate cause of the injury complained of, deprives him of the right to complain of the railroad company's breach of the statute: Western Ry. Co. v. Mutch, 97 Ala. 194; 38 Am. St. Rep. 179; Gibson v. Leonard, 143 Ill. 182; 36 Am. St. Rep. 376.

BROWN *v.* MACGILL.

[87 MARYLAND, 161.]

SPENDTHRIFT TRUSTS IN FAVOR OF THEIR CREATORS.—One cannot convey property, to be held in trust to pay the income to himself, excluding all liability to be taken for his debts, contracts, or engagements.

MARRIED WOMAN—SPENDTHRIFT TRUSTS—POWER OF TO CREATE IN HER OWN FAVOR.—Neither a married woman, nor a woman in contemplation of marriage, can place her property, which would otherwise be responsble for debts contracted with reference to it, beyond the reach of her creditors and still enjoy the use and benefit of it or of its income as fully and completely as she had done before. Hence, though the instrument by which she created the trust purports to authorize the trustee to pay her the income of the property free of the claims of her creditors, he will be required to pay out of such income any indebtedness created by her after her marriage and chargeable against her separate estate.

William L. Marbury and Carroll T. Bond, for the appellant.

Bernard Carter, for the appellee.

162 BOYD, J. This is an appeal from a decree of the circuit court of Baltimore City, dismissing the bill of complaint filed by the appellant against Sarah G. Macgill, Carroll S. Macgill, her husband, and James McEvoy, trustee. The bill alleges that on the sixteenth day of September, 1895, Sarah G. Macgill gave the appellant her note for the sum of two thousand dollars, which she borrowed from him with the understanding and agreement that it should be payable when demanded out of her separate estate, whether held in her own name or by the intervention of her trustee, James McEvoy, and that it was her intention and purpose to bind and charge her separate estate with the payment thereof. On the tenth day of September, 1894, which was a day or two before Mrs. Macgill, who was the widow of George B. Graham, deceased, was married to Carroll S. Macgill,

she executed a deed of trust by which she assigned and conveyed to James McEvoy, trustee, all property which she had derived from the estate of George B. Graham, and which she might receive from her daughter, Isabella Brown Graham, in trust, "to collect, receive, and after making all proper deductions for taxes and other charges thereon, to pay over the net rents, profits, dividends, interest, and income of all said property, real, personal, and mixed, to her, the said Sarah G. Graham, during her natural life, into her own hands and not to another, whether claiming by her authority or otherwise, for her sole and separate use and upon her separate receipts without power of anticipation, and excluding all right or interest in or power over the same of any husband she may have or any liability for his debts, contracts or engagements." It then provides for the disposition of the property after her death.

It is conceded that the debt was contracted by Mrs. Macgill with direct reference to her separate estate, and that it was her intention to charge the same. The testimony on that point is ample, under the decision of this court, to charge any separate estate she had with this debt, unless there be other reasons for its exemption.

163 It is contended, and the learned judge below so held, that by reason of the provisions in the deed of trust above quoted she had no power to charge or pledge the property held by James McEvoy, trustee. That being her only separate estate, so far as disclosed by the record, we are necessarily called upon to determine the effect of those provisions. Cases involving the right to place restrictions upon the alienation of property have been numerous, and have resulted in a great diversity of opinions between the courts that have passed upon the question. In England, it has been persistently and steadfastly held that a gift or grant of a beneficial fee simple or life estate, whether legal or equitable, carried with it the right of the donee or grantee, other than a married woman, to alienate the estate and charge it with his debts, and that all attempts to restrict these incidents belonging to such estates by forbidding payment of the income to anyone other than the donee or grantee, or prohibiting anticipation, were nugatory and without effect, except by way of cesser or limitation over of the estate. We will have occasion to consider the exception in favor of married women later on. In 23 American and English Encyclopedia of Law, 5, there is a very excellent note on the subject of spendthrift trusts, where it can be seen how widely the courts of this country have differed

on the main question. But it will serve no good purpose to enter into a discussion of those cases, as this court held in the case of Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, that the founder of a trust may lawfully provide in direct terms that his property shall go to his beneficiary to the exclusion of the alienees and creditors of the latter, and accordingly it was determined that the rents and profits held by the trustee in that case, which the testator directed should be paid into the hands of his son and "not into the hands of another, whether claiming by his authority or otherwise," could not be reached by his creditors either at law or in equity before such rents and profits were paid to him. It was conceded that the English cases, as well as many in this country, were opposed to the views adopted [164] by this court, but it was held that the reasons on which was founded the rule that the right to sell and dispose of property is a necessary incident to the ownership of it, do not apply to the transfer of property in trust. It was said that "the donor or devisor, as the absolute owner of the property, has the right to prescribe the terms on which his bounty shall be enjoyed, unless such terms be repugnant to the law. The creditors of the beneficiary have no right to complain because the founder of the trust did not give his bounty to them." By the will before the court in the case of Reid v. Safe Deposit etc. Co., 86 Md. 464, the testator left his property to trustees, who were succeeded by the appellee in that case, with directions that "they should pay the net proceeds from time to time to his wife during her natural life, and especially so that the same shall not be liable for the debts or contracts of any future husband, or in any manner subject to his control, or to be taken in execution or attachment or otherwise, howsoever, and so that she shall not pledge or anticipate said property or said net proceeds of income or any part thereof." We held that by virtue of those provisions the net income from the property in the hands of the trustee was not liable for her debts, and that the testator had full power to make such provisions under the decision in Smith v. Towers, 69 Md. 77; 9 Am. St. Rep. 398.

But whether one who is the owner of property can thus place it beyond his own control and power of alienation—especially beyond the reach of his creditors—presents another question. The case of Warner v. Rice, 66 Md. 436, goes very far toward denying such right. George Warner and others conveyed to a trustee certain property which had been left them by their father by a deed in which certain trusts were declared by the

grantors. The property of George Warner sought to be made liable to attachment in that case had by the deed been made subject to a declaration of trust as follows: "In trust for the use and benefit of said George Warner and his immediate family, free from [165] liability for any of his debts, contracts or engagements, and when, if so by said trustee found requisite, by him deemed proper, to apply the uses, rents, income, and profits to the support and maintenance of said George and his said family during his, said George's life," et cetera. This court held that the exemption attempted to be conferred upon the use of the property by that declaration was void and without effect, being contrary to law, and held the rents, from Warner's equitable estate in the ground rents attached, liable for the plaintiff's debts. It was said in that case that a beneficial legal estate in fee or for life could not be conveyed or devised to a person with a provision that it should not be alienated or subject to the debts of the legal owner, and it was also stated that, as a general principle, equitable estates cannot be effectually created with such provisos, except in the case of trusts created for the protection and benefit of married women. In Baker v. Keiser, 75 Md. 332, the cases of Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, and Warner v. Rice, 66 Md. 436, were discussed, and it was said that in the latter case this court "emphatically declared that it was wholly against the policy of the law to allow property, whether legal or equitable, to be fettered by restraints upon alienation; and, generally, the court said, whenever property is subject to alienation by the owner, it is subject to his debts." It was stated in that opinion that the majority of the court concluded in Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, that there was nothing in the decision of Warner v. Rice, 66 Md. 436, "which should restrain the court from saying that the founder of the trust could by sufficiently clear language create a trust for a beneficiary without the power of alienation," but the opinion concluded by saying that: "This court went as far as it could in Towers' case to effect the intention of the testator which was so expressly declared; but proper adherence to the policy of the law in the state will not allow the extension of the doctrine of the Towers case beyond the limitations of that decision, nor to a case not falling clearly within its reasons and reasoning."

But this case of Warner v. Rice, 66 Md. 436, is clearly distinguishable [166] from that of Smith v. Towers, 69 Md. 77, 9

Am. St. Rep. 398, and of Reid v. Safe Deposit etc. Co., 86 Md. 464, inasmuch as in that case there was an attempt of the owner of the property to place it beyond the reach of his creditors and yet retain the enjoyment of it during his life, whilst in the other two cases the testators were creating trusts in favor of third persons. The theory upon which courts have held restraints upon alienation, et cetera, valid, is that the cestui que trust only has what the donor has given him—is the recipient of his bounty—and therefore if the donor has not given him the right to alienate the property or make it subject to the payment of his debts, no one has the right to complain. As is well said in Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504, "under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of the trust and take more than he has given." This is well illustrated in the Missouri cases. In Lampert v. Haydel, 96 Mo. 439, 9 Am. St. Rep. 358, and in Partridge v. Cavender, 96 Mo. 452, the doctrine has been distinctly announced that by the use of apt terms a testator could forbid the alienation of property in trust and could place it beyond the reach of the creditors of the beneficiary; but in Bank of Commerce v. Chambers, 96 Mo. 459, a husband who has released his curtesy in his wife's estate, accepting in lieu thereof an income given him by her will, was regarded as a purchaser of such income and not a mere recipient of his wife's bounty, and therefore the income was held to be subject to the claim of his creditors, notwithstanding the provisions in the will to the contrary. In referring to Lampert v. Haydel, 96 Mo. 439, 9 Am. St. Rep. 358, that court said that it, "and the class to which it belongs, rests in a large part upon the distinct ground that a creditor is not defrauded and therefore has no cause of complaint, because the owner of the property in the free exercise of his will so disposes of it that the object of his bounty, who parts with nothing in return, has a sufficient income provided for and applied to his life support." Even that class of cases should be carefully guarded, and the courts should [107] not be inclined to exempt property from its usual incidents of the right of alienation and liability for debts unless the language of the donor be free from doubt. But it is going too far and is too violently assaulting the policy of the law of this state, as indicated above, to permit a person to convey property owned by him to a trustee, and still retain full enjoyment of the income and revenues from it through the instrumentality of the trustee, and yet have the

interest he retains for himself, worth, it may be, thousands or tens of thousands of dollars per annum, so fettered by his own act that it cannot be disposed of or be reached by his creditors. It is true that our land records are open to the public, and, in contemplation of law, what is properly recorded therein is presumed to be known by all, yet the fact remains that if a person has once owned property and continues to occupy it or use it just as he has always done, it would occur to but few persons, if any, at least in ordinary transactions, that he must inquire, perhaps employ counsel to ascertain, whether there had been any change in the legal status of such property. It may be argued that this may happen in the cases we have already said are lawful in this state, where the bounty is bestowed upon third persons, and to some extent that may be true, but in those cases persons dealing with them may perhaps be expected to ascertain what the party receives—what interest in the property was given to him—but in the case before us he would not only have to find out what property he owned in the beginning, but from time to time examine the records to see whether the former and still ostensible owner of it continued to retain any interest that was liable for his debts. It cannot be denied that property is deprived of some of its greatest value to the community in which it is held or located, when beyond the power of alienation or reach of the creditors of its present owners. To hold that a grantor can retain all the use and enjoyment of his property for life "free from the incidents of property and not subject to his debts, would be a dangerous and startling proposition to sanction." We 168 do not think it can be sustained by reason or authority. So far as we are aware the authorities are the other way: Warner v. Rice, 66 Md. 436; 4 Kent's Commentaries, 311; Mackason's Appeal, 42 Pa. St. 330; 82 Am. Dec. 517; Ghormley v. Smith, 139 Pa. St. 584; 23 Am. St. Rep. 215; McIlvaine v. Smith, 42 Mo. 45; 97 Am. Dec. 295 (approved as to this point in Lampert v. Haydel, 96 Mo. 439; 9 Am. St. Rep. 358); Pacific Nat. Bank v. Windram, 133 Mass. 175; Jackson v. Von Zeidlitz, 136 Mass. 342.

But conceding this to be the law as to those who are sui juris, how far does it apply to married women or to a deed made by one in contemplation of marriage? That is the important and most difficult question before us. The doctrine of the separate estate of a married woman was purely a creature of equity and worked a radical change in the principles of the common law applicable to the marital relation, as affecting the rights of prop-

erty between husband and wife. In Buckton v. Hay, L. R. 11, Ch. Div. 645, the master of the rolls said that "it was considered that to give it to her without restraint would be practically to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed, restraining her from anticipating her income, and thus fettering the free alienation," and in Tullett v. Armstrong, 4 Mylne & C. 377, Lord Chancellor Cottenham said: "The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together." And again: "It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate, and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation." In other words, the reason that the English courts permitted these restrictions on property of a married woman, although they [169] had denied their validity as against the property of persons sui juris, was that her right to hold property free from her husband's control was created for her by courts of equity and the chancellors thought she was not sufficiently protected from her husband without this restraint. It was very reluctantly done and only because it was deemed necessary for the protection of wives from their husbands, as a study of the English cases will show. What we have said above in regard to these restraints imposed by third persons will, of course, apply to a married woman when she is the recipient of the bounty of another, but we cannot consent to the establishment of a doctrine in this state which will enable a married woman, or a woman in contemplation of marriage, to place her property that would be otherwise responsible for debts contracted with reference to it beyond the reach of her creditors and still enjoy the use and benefit of it as fully and completely as she had done before. We do not mean to intimate that she cannot so settle her separate property as to place it beyond the control and reach of her husband and his creditors, but when the rights of her creditors are involved, and the property in question be of the character that would be liable to such creditors but for such restraints, she would not be permitted to escape the payment of her just debts by reason of her own declaration that such

property should not be liable for her debts or that the income should be paid to her alone and not to another, notwithstanding it is made a matter of record before the debts are contracted. There is no necessity to establish such a doctrine for her protection against her husband, as under the laws of this state she has ample protection against him and his creditors, and we do not "assume that husbands will be constantly endeavoring to wrest their wives' property from them and devote it to their own uses": Cooke v. Husbands, 11 Md. 505; Olivet v. Whitworth, 82 Md. 282. Separate estates were created in equity because married women could hold no other. As the husband at common law became the absolute [170] owner of the wife's personal property and of the rents and profits of her real estate, during coverture, she was not liable for debts, or, to speak more accurately, she could not contract them. When, therefore, chancellors created an estate that she could hold and dispose of and which was liable for her debts, if contracted with reference to it, by going a step further and permitting restraints on alienation and anticipation they did not place the property in a worse position, so far as the debts of married women were concerned, than it was before the equitable separate estate was created. But, under our laws, a married woman may not only have an equitable separate estate, but by statute she may acquire property by purchase, gift, grant, devise, bequest, descent, in course of distribution, or, as amended in 1892, in any other manner, and, however obtained, it is protected from the debts of her husband. Such property she holds for her separate use, with power of devising it as fully as if she were a feme sole, and she may convey it by joint deed with her husband. It is not necessary for her to have a trustee to secure her the sole and separate use of her property, but, if she desires it, she can appoint one by deed, her husband joining with her, or she can apply to a court of equity and have one appointed. The husband and wife may jointly charge her statutory separate property in the same way that she could charge her equitable separate estate, even by a parol contract, and courts of equity have the power to enforce the one as well as the other: Wingert v. Gordon, 6 Md. 106, and cases there cited. She may be sued at law on a note, bill of exchange, single bill, bond, contract, or agreement, executed jointly with her husband. Property earned by her skill, industry, or personal labor, as well as the income therefrom, is held by her to her sole and separate use, with

power as a feme sole to dispose of it, and it is liable for debts incurred by her about such business. In short, the tendency of our legislation is to greatly enlarge both her powers and liabilities, although it carefully protects her property from her [171] husband and his creditors, so that now many of the reasons for decisions rendered in the past century, or the early part of the present one, can no longer have much force under our changed conditions. This particular question was not passed upon by this court when we still had the conditions to meet that originally influenced in the English courts, and as we are now called upon for the first time to decide it, at a time when the policy of the state is so radically different in its dealing with married women from what it formerly was, we do not feel called upon to be governed by reasons no longer applicable and make an exception in favor of married women, or those in contemplation of marriage, especially as it might result in creating a privileged class which would not reflect credit upon the law that created it nor the state that fostered it. Property is too easily transferred from husband to wife to permit her to do what he is prohibited from doing, because it is contrary to the policy of the law, calculated to tempt his honesty and to impose upon and deceive those dealing with him. If the wife is at the mercy of and under the absolute control of the husband, as seemed to be the moving cause of the English courts when they supported the validity of the prohibition against alienation in her favor, then he can with great facility make use of her to do what he himself cannot do, if we hold she can place such restraints on her property. He would only be required to convey the property to her and let her place such restraints on it as he desired, to make it impregnable against the assault of creditors, although he could not do it himself as long as the property was his own, because he was sui juris. Would not the result of such a decision be that a married man who wanted to have such restraints on his property could convey it to his wife and thus accomplish indirectly, through his wife, what he could not do directly?

Without meaning to say that the facts and reasoning are in all respects applicable, the Massachusetts and Pennsylvania cases are more in accord with our views of the proper [172] doctrine to establish as the law of this state on this question than the English cases are: See Pacific Nat. Bank v. Windran, 133 Mass. 175; Jackson v. Van Zedlitz, 136 Mass. 342; Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215, in which the courts of

those states have passed on the general subject, as well as on the proposed exception in favor of married women. In the case of Reid v. Safe Deposit etc. Co., 86 Md. 464, this court, after referring to Brandon v. Robinson, 18 Ves. 434; Buckton v. Hay, L. R. 11 Ch. Div. 645, and Tullett v. Armstrong, 4 Mylne & C. 377, to show the views of the English courts, said: "It thus appears that the exception in cases of devises and settlements upon married women was deemed necessary only because of the general rule that restraints upon alienation and anticipation were always regarded as repugnant to the estate. But in Maryland this is not the general rule." And then after quoting from Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, to show what the law is here, it was said: "In this state, therefore, where the law is as just stated, it is difficult to perceive why trusts in cases of married women do not stand on the same footing as other trusts of the same nature." Although this precise question was not involved in this case, we strongly intimated that we differed from the English decisions which applied a different rule in favor of trusts to married women from that applied to other trusts of the same nature, and we are of opinion that the rule which we have above laid down for persons who are sui juris is equally applicable to them. The income from the property in the hands of the trustee is therefore liable in equity to the payment of the debt due the appellant. We have not thought it necessary to advert to the fact that the deed was made when Mrs. Macgill was single, as it seems to have been practically conceded that it was made in contemplation of marriage, or that her husband departed this life after the debt was contracted and after this suit was brought.

The decree will be reversed and the cause remanded in order that the lower court may pass a decree requiring the [173] trustee to pay out of income now in his hands or that may hereafter come into his hands, the amount due on the note of Mrs. Macgill, together with the costs in this court and the court below.

Decree reversed and cause remanded.

Page, J., dissents.

SPENDTHRIFT TRUSTS—CREATION IN ONE'S OWN FAVOR. A person cannot settle his property in trust to pay the income to himself for life, with a provision that it shall not be alienated by anticipation, so as to prevent his creditors from reaching the income: Taylor v. Buttrick, 165 Mass. 547; 52 Am. St. Rep. 530. Where an unmarried woman, not in contemplation of marriage, creates an irrevocable trust in her own property, for her own benefit for life, without liability for her debts or contracts, and with power

to dispose of it at death, the trust is void as to her creditors, and they may subject the income of her property to the payment of their claims: Ghormley v. Smith, 139 Pa. St. 584; 23 Am. St. Rep. 215, and note. See monographic notes to Smith v. Towers, 9 Am. St. Rep. 404-408, and Garland v. Garland, 24 Am. St. Rep. 686-697. Compare Chestnut Street Nat. Bank v. Fidelity Ins. etc. Co., 186 Pa. St. 333; 65 Am. St. Rep. 860.

BALTIMORE *v.* FAIRFIELD IMPROVEMENT COMPANY.

[87 MARYLAND, 352.]

MUNICIPAL CORPORATIONS—PESTHOUSES AND HOSPITALS.—The delegation to a municipality of the power to erect and maintain pesthouses and hospitals does not deprive a private citizen of the right to complain of any special injury sustained by him as a consequence of the exercise of the power. There is no presumption of an intent on the part of the legislature to sanction any act or use of property which will create a nuisance injurious to the property of another.

HOSPITALS AND PESTHOUSES.—The mere power to erect and maintain hospitals and pesthouses does not imply or include the further power to erect and maintain them in such a way or in such a place as will cause injury to others.

NUISANCE—PESTHOUSES, INJUNCTION AGAINST.—The erection and maintenance of a pesthouse in the vicinity of a city and adjoining a tract of land which has been divided into building lots, many of which have been sold, and upon several of which buildings have been erected for use as residences, may be enjoined When, however, the pesthouse is in a suitable place when erected and first used, persons who subsequently locate near it are not entitled to abate it.

NUISANCE, WHAT IS.—If a nuisance complained of will of itself produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant, he is entitled to relief by injunction.

MUNICIPAL CORPORATIONS—ABANDONMENT AND LOSS OF RIGHT TO MAINTAIN A PESTHOUSE.—If a municipal corporation authorized by statute to erect and maintain hospitals and pesthouses, after using a tract of land for many years for that purpose, discontinues that use, burns its pesthouse and other buildings, and obtains property elsewhere and there isolates contagious diseases, and owners of real property adjacent to the tract first used divide their property into building lots, many of which are sold and occupied for residence purposes, the municipality has no right to revive the use of the first tract as a place at which to keep persons suffering from leprosy and other contagious diseases. Especially will the municipality be enjoined from placing a leper on such tract without taking such measures as will insure his isolation and prevent the communication of his malady to others.

Thomas I. Elliott, city solicitor, Louis Putzel, city attorney, and Thomas G. Hayes, city counselor, for the appellant.

John P. Poe, Enoch Harlan, Robert Moss, and J. Charles Linthicum, for the appellee.

[359] McSHERRY, C. J. This appeal was taken from a decree of the circuit court of Baltimore City. That decree enjoined the mayor and city council of Baltimore from placing and keeping on a twenty acre tract of land owned by the city an unfortunate woman afflicted with leprosy. This land adjoins property belonging to the Fairfield Improvement Company of Baltimore, and the property of the company is divided into building lots. Many lots have been sold and quite a number of houses have been built in the vicinity of the city's land. This twenty acre tract was acquired by the city perhaps half a century ago. It is situated some three miles distant from the city and lies in Anne Arundel county. Up until the year 1883 it was occupied as a place of quarantine against contagious diseases brought toward the city by water; and there were hospitals upon it that were used for the isolation and treatment of similar diseases originating or found in the city during the prevalence of epidemics. In or about the year just named the mayor and city council purchased other property, located near Hawkins' Point, some sixteen miles distant from the city, and there established a quarantine station, [360] which has ever since been in charge of a resident physician selected by the city. There have been no cases of contagious or infectious diseases treated upon this twenty acre lot or tract since 1882 or 1883; and it was subsequent to that time that the Fairfield Improvement Company's property was developed. A great many persons—chiefly employés of fertilizer and other factories—now reside in Fairfield; and doubtless they located there in the belief that the city had permanently abandoned the hospital and pesthouses formerly used in that locality.

The ground upon which the relief by injunction was sought is, the apprehended injury to the company's contiguous property by the placing of a person suffering with such a loathsome and horrible disease in close proximity thereto.

The statute law of the state confers upon the mayor and city council plenary power to establish, both within and beyond the city limits, hospitals and pesthouses for the isolation and treatment of contagious and infectious diseases: Code Public Local Laws, art. 4, secs. 378, 409. The preservation of the public health renders such legislation highly essential, and the authority of the general assembly to enact it, in the exercise of the police power of the state, is beyond question or controversy. Within the scope of the power thus granted the whole authority of the state is included and delegated: Harrison v. Mayor etc., 1

Gill, 264; and, therefore, whatever the state may directly do in furtherance of these objects, the municipality, clothed with a delegated power from the state, may also lawfully perform, though there may be a difference as to the legal consequences resulting from an exercise of the power by the state directly, and those flowing from an exertion of the same power by the municipality. If it be conceded that the state may, in exercising a public power, create a private nuisance with immunity, the immunity grows out of the public necessity and rests upon the state's sovereignty; but it [361] cannot—or at all events, will not, in the absence of an explicit legislative declaration—be assumed that the state would, if directly exercising the same power, so exercise it as to produce or cause an injury to the rights of property of an individual, unless, perhaps, the very doing of the act directed to be done will necessarily and unavoidably, under any condition, result in the creation of what would be, but for the authorization, a private nuisance. The delegation of a power to do an act, whilst conferring full authority to perform the act itself, does not, therefore, without more, essentially and without exception, carry the right to so do it as to inflict loss or injury upon an innocent individual. As thus understood, the power of the municipality to erect and maintain hospitals and pesthouses may be exerted and applied precisely as the same power, if not delegated, could have been availed of by the state. Acts done under such delegated authority, which without that authority would in themselves be public nuisances, furnish no ground for civil or criminal proceedings at the instance of the state; for the authority to do the acts makes them, when done, perfectly lawful as respects the public; and, being lawful, there is no superior public right which they invade or violate. These are what have been sometimes described as "legalized nuisances" (Wood on Nuisances, c. 23), since they are strictly necessary and probable results of legislative authorization. They ultimately rest for their sanction upon the paramount power of the legislature and the importance of the public benefit and convenience involved in their continuance as affecting the greatest good to the greatest number: Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659. But however free from interference by the public acts of this character may be when authorized to be done by a municipality under competent and sufficient legislative grant, the right of an individual to complain of the special injury sustained by him as a consequence of their being done is, ordinarily, in no way impaired or affected. The mere naked

grant of power to a municipality to do acts, which if done without the sanction [362] of that power would be nuisances, does not in all instances carry with it a guaranty of immunity from claims for private injuries that result directly from the exercise of the power. And this is necessarily so in the absence of an explicit or implicit legislative declaration to the contrary, because the legislature cannot be presumed, from a general grant of authority, to have intended to sanction or legalize any acts or any use of property that will create a private nuisance which will injuriously affect the property of another. That the state may, in the exercise of the police power, and for the preservation of the public health, authorize the summary destruction of private property contaminated with the germs of disease, is thoroughly and definitively settled: Deems v. Mayor etc., 80 Md. 174, 175; 45 Am. St. Rep. 339; Boehm v. Mayor etc., 61 Md. 259; Mugler v. Kansas, 123 U. S. 623. But there is a broad distinction between a summary destruction of an offending thing, and a direct injury to unoffending property—that is, property itself not liable to destruction because not dangerous to the public health or safety. The immediate and imminent danger to life or health justify, under the police power, the one; whilst the other is left to be redressed in the due course of the law. However broad, therefore, may be the powers of a municipality to erect and maintain hospitals and pesthouses for the segregation and treatment of contagious and infectious diseases, and however necessary their exercise may be, they must, generally speaking, be exerted and put into operation subject to the no less well defined right of the individual to possess and enjoy his unoffending property without the molestation of a nuisance. It cannot be pretended that the city authorities could, even under their comprehensive powers, locate a pesthouse in the midst of a thickly settled community. The right to locate the pesthouse does not carry with it or include the right to locate it in a place where other persons would be exposed to the contagion and disease. "Powers given by statutes are not to be used to the peril of the lives or limbs of the queen's subjects. They [363] are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others," observed Watson, B., as quoted in 2 Addison on Torts, section 1041. Where commissioners of sewers and boards of health have obtained statutory powers of drainage into rivers, streams, and natural watercourses, the power must be exercised so as not to create a nuisance or interfere with the private rights of individuals: 2 Addison on Torts, sec. 1085.

The mere power to erect and maintain hospitals and pesthouses does not imply or include the further power to erect and maintain them in such a way or at such a place as will cause injury to others. And so in Brower v. Mayor etc., 3 Barb. 254, it was held that statutory authority given to commissioners of emigration to lease or purchase docks where emigrants may be landed will not justify them in leasing for that purpose property situated in a thickly populated part of a city where the contemplated use of the premises would be a serious menace to the health of the community: See, too, County Commrs. v. Wise, 71 Md. 52, 53; West Orange v. Field, 37 N. J. Eq. 600; 45 Am. Rep. 670; Danbury etc. R. R. Co. v. Norwalk, 37 Conn. 109; Seifert v. Brooklyn, 101 N. Y. 136; 54 Am. Rep. 664; Wood on Nuisances, sec. 764. Whatever immunity a municipality may have in exercising a public, as contradistinguished from a strictly corporate, power, it does not result from some collateral act or from the negligent doing of a permissible act. The infliction of an injury upon another is neither the natural nor the necessary result of an exercise of the power to build an hospital; but if injury does ensue, it would result from the collateral circumstance that the place selected was not the appropriate site, or from the negligent method of doing what would otherwise be a lawful act.

Assuming at this point that leprosy is a contagious disease which is a menace to the health of a community, and assuming also that the mayor and city council, through its health department, were about to utilize this twenty acre tract of land for the first time for the erection of a pesthouse [364] thereon for the reception of this particular patient, there can, in view of the legal principles just discussed, and in the light of the facts to which allusion has been made, be no doubt as to the right of the Fairfield Improvement Company to invoke the restraining aid of a court of equity to prevent the establishment of such a nuisance: Wood on Nuisances, sec. 796. But it is insisted that the company went to the nuisance, and it is denied that the nuisance went to the company, and, therefore, it is contended that the relief sought cannot be granted. Though there cannot be a prescriptive right to maintain a public nuisance, there may be such a right as to a private one. The authority given by the legislature to the city to erect such a pesthouse prevents it, when erected and used, from being a public nuisance. If it be no nuisance at all when erected, because of being erected in a secluded locality, persons who afterward locate near it are not, if injured,

deprived of redress merely because they have voluntarily chosen to reside in close proximity to it, if the right to maintain it has not ripened by prescription into an indefeasible right. This doctrine was settled in Susquehanna Fert. Co. v. Malone, 73 Md. 280, 281; 25 Am. St. Rep. 595; and is fully supported by the cases therein cited.

This brings us to an examination of the facts so that we may determine whether they fall within the principles we have been considering.

Leprosy is, and has always been, universally regarded with horror and loathing, and it is conceded to be an incurable disease. In past ages its unfortunate victims, shunned and avoided by their fellowmen, viewed by all with superstitious dread, wandered about the open country naked and starving. Hospitals for the relief of those smitten with the terrible malady seem to have been unknown in antiquity. The sufferers were eventually isolated in villages occupied by them exclusively. With the tide of emigration westward during the decline of the Roman empire, leprosy was spread over Europe, and in the middle ages it prevailed to an alarming extent—its principal ravages dating from the [365] first crusades. The influence of Christianity tempered the rigor of the afflicted, and as early as 583 the third Council of Lyons directed the bishops of each city to feed and support the lepers at the expense of the church. In the thirteenth and fourteenth centuries hospitals and asylums were numbered by hundreds in almost every country. But whether isolated in villages in the east, or segregated in hospitals in the west, the leper was completely and forever an outcast, being considered both legally and politically dead. The advance of civilization, whilst in a measure ameliorating his condition and checking the spread of the pestilence, stripped the disease of none of the dread with which it had always been regarded by the great majority of mankind. The horror of its contagion is as deep-seated to-day as it was more than two thousand years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote and by no means dangerous; but the popular belief of its perils, founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot in this day be shaken or dispelled by mere scientific asseveration or conjecture. It is not, in this case, so much a mere academic

inquiry as to whether the disease is in fact highly or remotely contagious; but the question is, whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do a serious injury to the property of the plaintiff there located. As to this the record leaves no room for doubt. That the disease is contagious no one seems to deny. Its liability to contaminate others is the element that makes its introduction into a community a nuisance, and when it is conceded that the purpose is to place this woman, having a fully developed and far-advanced attack of leprosy, in charge of a laborer and his wife, who have had no experience in such a case, and who have several small children [366] in their family, the danger of spreading the contagion is perfectly obvious. It will not do to say that the children are to be separated from their parents. There would be great hazard of their being brought in contact with the patient. The record abundantly shows that the Fairfield Improvement Company's property will be seriously lessened in value—that residents of the vicinity will abandon their homes —if this unfortunate and afflicted woman should be placed where the city proposes to confine her. On this branch of the case we entertain no doubt that the facts fully warranted the issuing of the injunction. "In all such cases the question is, whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant": Dittman v. Repp, 50 Md. 521, 522; 33 Am. Rep. 325; Wood on Nuisances, sec. 66, and note 4, and cases therein cited.

Inasmuch as the infliction of injury on any individual was not necessarily contemplated in the grant of the power referred to, that is to say, was not a necessary and inevitable consequence of an exercise of the power to maintain an hospital, the right to maintain it at this particular place in the existing circumstances cannot be put on the ground of explicit or implicit authorization; and it remains now to inquire whether a prescriptive right is possessed by the city to build or to continue a pesthouse in the vicinity of Fairfield. Had the city never abandoned this locality as a place for the confinement and treatment of contagious diseases, it is very doubtful whether its right to place this patient there could now be challenged. It is equally doubtful whether the adjoining property would ever have been improved and peo-

pled as it now is, if the old quarantine station, hospitals, and pesthouses had not been long ago discontinued. In 1883, when the new quarantine [367] property at Hawkins' Point was purchased, this twenty acre tract was in point of fact abandoned by the city as a place for the isolation of contagious diseases. Later on, and after improvements had progressed in the vicinity, the hospital buildings and pesthouses were burned by the city health officers; and still later, a resolution was adopted by the city council directing the sale of the property except that portion which had been used as a burying-ground for those who died during the epidemics years ago. When persons have acted on the belief, founded on such palpable evidence indicating that the city had physically abandoned this property for the isolation and treatment of contagious diseases, it is too late, especially when that physical abandonment has been followed by the passage of a resolution actually directing the property to be sold, to assert the right to restore the place to its former uses, if such a restoration would cause injury to those who have in good faith relied on the conduct of the city in actually discontinuing the use of the property for the purposes of quarantine and isolation. The conclusion of fact we draw from the record is, that there was an abandonment of this property by the city when it removed its quarantine officers and attendants to Hawkins' Point; and the city cannot now, to the detriment of the appellee, resume the occupation of this place for the detention of this patient. She must be placed elsewhere.

The evidence shows, as we have indicated, that the health authorities of the city propose to place this woman in the charge of a laborer and his wife. A contract has been made with them, and under it this laborer and his wife agree to care for the patient. They are unskilled people. They possess no authority to restrain the woman from wandering away, and they have no legal right to detain her against her will. They are not officers of the city, nor clothed with any of the powers of the board of health. They are simply employed by the city to care for this woman on the city's property, where no health officer or city official is stationed. The mere fact that the place of her proposed [368] detention belongs to the city adds nothing to the power of the laborer to hold her; and most certainly these facts do not amount to the establishment of an hospital under the power which the city possesses. The contract is on its face unreasonable. Its tendency is to cause a dissemination of the dis-

ease and not to protect the community; and for this, if for no other reason, the injunction ought to be made perpetual.

There was no error committed in granting the relief prayed and the decree appealed from must be affirmed.

MUNICIPAL CORPORATIONS — POWERS — CREATION OF PESTHOUSES—LIABILITY FOR MAINTENANCE OF NUISANCE.—The general rule of law is, that a municipal corporation has no more right to erect and maintain a nuisance than has a private individual: Extended note to Fort Worth v. Crawford, 15 Am. St. Rep. 845. The legislature of a state may confer upon municipal corporations, or other suitable public bodies, power to take measures for preserving the health and safety of the inhabitants of the city or district over which they have control or jurisdiction. But while the power to establish pesthouses, to enforce quarantine regulations, and to compel persons infected with contagious diseases to remove to pesthouses or hospitals, and to isolate themselves from other persons, is undoubted, it must nevertheless be exercised in such a manner as to cause as little hardship to the unfortunate class of persons upon whom it is exercised, as the exigencies of the occasion and a proper regard for the public welfare will permit: See monographic note to Markham v. Brown, 92 Am. Dec. 77, 78.

INJUNCTION AGAINST NUISANCE—WHEN GRANTED.—A business which is a nuisance per se, as well as one that is so conducted as to become an actual nuisance, will be enjoined; but a business which merely threatens to become a nuisance will be enjoined only when the court is satisfied that the threatened nuisance is inevitable: Windfall Mfg. Co. v. Patterson, 148 Ind. 414; 62 Am. St. Rep. 532, and note; Kaufman v. Stein, 138 Ind. 49; 46 Am. St. Rep. 368.

GORE *v.* CONDON.

[87 MARYLAND, 368.]

DAMAGES FOR INTERFERING WITH ANOTHER'S PROPERTY OR TENANTS.—One who prosecutes a proceeding purporting to affect the title to real property, knowing that his title is invalid and based upon fraud, and who interferes with the tenants of the owner by serving notices on them not to pay rent, thereby causing them to abandon the property and the owner to lose his rents, is liable to an action brought by the latter to recover damages thus suffered.

PRACTICE—MISJOINDER.—A complaint containing two distinct and independent causes of action in the same count, one for damage for interfering with the plaintiff's property, and the other for damage to his reputation, is bad for misjoinder.

LIBEL.—For words spoken or written in the course of a judicial proceeding or in giving evidence therein no action will lie. Hence the owner of real property cannot maintain an action for the disgrace and disrepute into which he is brought on account of the advertising for sale of such property under an unfounded claim.

H. P. and R. E. Jordan, for the appellant.

Richard B. Tippett, James E. Tippett, and W. Sherman Bansemer, for the appellee.

372 BRISCOE, J. This is an appeal from a judgment for the defendant upon a demurrer to the plaintiff's declaration. The cause of action set forth is of an unusual character, and we will state it in the language of the declaration itself, which is as follows: "And the said Martha E. Gore, by her husband and next friend, Lewis D. Gore, of Baltimore City, in the state of Maryland, sues Levi Z. Condon, of the city and state aforesaid: For that on or about the eleventh day of May, 1889, the said defendant fraudulently obtained from one Daniel Frazier a fraudulent and void mortgage for the sum of six hundred dollars, upon the property of the plaintiff, situate in the city of Baltimore, on North Gilmor street, near Presstman street, which said fraudulent and void mortgage contained a consent clause for an ex parte decree, the said Condon well knowing at the time of obtaining said fraudulent mortgage that the property upon which it was obtained, and which was described therein, was the property of the said Martha E. Gore, and not the property of the said Daniel Frazier, the mortgagor therein, and that said mortgage was fraudulent and null and void as to the said plaintiff and her said property therein described.

"Yet, notwithstanding the said defendant knew that the said mortgage was fraudulently obtained, and was fraudulent and void as to the said plaintiff, the said Martha E. Gore, and her said property therein described, yet, nevertheless, to further carry out his fraudulent design, the said defendant did, on or about the — day of ———, 1894, file his petition and said fraudulent mortgage in the circuit court of Baltimore City, alleging said mortgage to be in 373 default, and under the said consent clause therein obtained an ex parte decree from said circuit court for the sale of the plaintiff's property, Charles W. Nash, Esq., of the Baltimore city bar, being appointed trustee by said decree to make said sale, and on or about the 13th of June the said defendant actually caused said trustee to advertise said property for sale, and he, the said defendant, notified the said plaintiff's tenants in the property to pay no more rents to the plaintiff; that in order to save her said property from sale as aforesaid, under said fraudulent mortgage and decree so fraudulently obtained as aforesaid, plaintiff was compelled to file her bill of complaint in said circuit court aforesaid (which she did on or about the twentieth day of June, 1894), setting forth the fraudulent character of said mortgage, and praying for an injunction to restrain said sale aforesaid, and that said mortgage be decreed

to be fraudulent and null and void as to her and her property therein described; the said writ of injunction did issue and was served upon the defendant, Condon, and the said trustee, and remained in force until on or about the third day of June, 1895, during all which time the said plaintiff received no rent or profits from her said property on account of the said defendant notifying the tenant in said property to pay her no rents; and during all which time the taxes, water rents, and ground rents were accumulating, when, after hearing said cause, said circuit court dismissed the plaintiff's bill of complaint with costs to the defendant, from which said last decree the said plaintiff, on or about the fifth day of June, 1895, took her appeal to the court of appeals of Maryland, the said defendant, Condon, having full knowledge of said appeal. That notwithstanding the said defendant, Condon, had actual knowledge of the fraudulent character of said mortgage, and that the property therein described was the property of the said plaintiff, Martha E. Gore, and that there was an appeal pending in said court of appeals from said decree dismissing her bill of complaint, yet, pending said appeal, he seized and sold said property under said ex parte decree; [374] whereupon all her tenants moved out without paying her any rent, and leaving said ground rents, taxes, water rents, and other expenses unpaid. That after arguing said appeal in the court of appeals, the said court reversed the decree of said circuit court of Baltimore city, and decided the said mortgage from said Frazier to said Condon to be fraudulent and void as to the said plaintiff, the said Martha E. Gore, and her said property, and remanded said cause to said circuit court, the said defendant, Levi Z. Condon, to pay all costs above and below; all which more fully appears from the opinion of said court of appeals, recorded among the cases of said court designated to be not reported, liber —, folio —, October term, 1895; a copy of which opinion, taken from the "Daily Record," of November 25, 1895, is hereto attached as part thereof.

"And said circuit court of Baltimore city, in pursuance of said opinion and decree of said court of appeals, passed a decree setting aside said sale made pending said appeal aforesaid, making said injunction perpetual and declaring said mortgage null and fraudulent as to the said plaintiff, Martha E. Gore, and her property. That at the time of advertising the said property, and of the defendant, Condon, notifying her tenants to pay her no more rent, the plaintiff had upon the premises three good, prompt paying tenants who had occupied the premises for some

time previous to said advertising and notice aforesaid, to wit, a tenant in the dwelling-house paying twenty dollars per month, a tenant in the two rooms over the stable paying five dollars per month, and a tenant on the ground floor of the stable paying two dollars and fifty cents per month rent, all of whom, upon the sale of said property, moved out, paying the plaintiff no rent and leaving the property in the hands of the defendant vacant (unless tenants he may have put in), the said defendant not even paying the taxes, ground rents, and other expenses during all the time he was in possession thereof.

"And the plaintiff claims she had been damaged by the unlawful trespass upon her property and advertising the [375] same for sale, and sale thereof, and for the disgrace and disrepute into which she was brought on account of said advertising and sale, for the loss of her rents and profits from the time the defendant notified her said tenants to pay her no more rents, and for her large expenditure of money in securing possession of her said property, in paying witness per diem and mileage, besides her own loss of time and expense, and for the depreciation in the value of her property from neglect and nonoccupancy while in the hands of the defendant, and other damages to the said plaintiff and her property from and by the unlawful acts and doings of the said defendant in this behalf."

It will be seen that this is not an action for the malicious prosecution of a civil suit without probable cause. Such an action is generally maintainable, as was held by this court in McNamee v. Minke, 49 Md. 133, where there has been an alleged malicious arrest of the person or a groundless and malicious seizure of property or the false and malicious placing of the plaintiff in bankruptcy, or the like. But such suits are not, however, encouraged, says this court in Clements v. Odorless Excavating Apparatus Co., 67 Md. 463, 1 Am. St. Rep. 409, because the law recognizes the right of everyone to sue for that which he honestly believes to be his own, and the payment of costs incident to the failure to maintain the suit is ordinarily considered a sufficient penalty. In an action for malicious prosecution or the abuse of process, the plaintiff must allege and prove that the suit was instituted maliciously and without probable cause. The declaration before us does not aver malice or the want of probable cause, and does not count upon the malicious prosecution of a civil suit. No suit was in fact instituted against the plaintiff. It alleges a wrongful interference

by defendant with the property of the plaintiff, and is an action on the case for consequential damages.

The allegations of the declaration, which are admitted by the demurrer, show that the defendant caused plaintiff's tenants to refuse to pay to her their rents and caused other [376] injuries to plaintiff, and that the defendant did intermeddle with property of which plaintiff was in possession with the right to possess, and which defendant knew to belong to the plaintiff. The question then is, whether the conduct of the defendant, under the circumstances stated in this case, constituted such a wrongful act as will give rise to an action of damages. It would certainly seem just that if a man knows that certain property is not his, but another's, and that he acquired an apparent title to the same by fraud, and that the title is void, then his intermeddling with such property, to the damage of the real owner, is an unlawful act, for which a remedy should be afforded. To deny a remedy to the aggrieved party in such cases would be a reproach to the law. The mere fact that the interference with another's property was done under a claim of right and title is no defense, especially when, as in the present case, he knows that his title is fraudulent and void. An action has been held to lie in many cases of such interference when the parties have acted in good faith and under an honest mistake. In Levi v. Booth, 58 Md. 318, 42 Am. Rep. 332, this court regarded it "as clear law that a person is guilty of a conversion who intermeddles with the property of another and disposes of it, and it is no answer that he acted under authority from some other person who had himself no authority to dispose of it." No good reason can be given why the same principle is not applicable to such acts of interference with a party's ownership of land as are described in the present case.

The right to maintain the action can also be sustained, upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other or to obtain a benefit for himself, does the other an actionable wrong: Lucke v. Clothing Cutters etc. Assn., 77 Md. 398; 39 Am. St. Rep. 421; Angle v. Chicago etc. Ry. Co., 151 U. S. 14; Lumley v. Gye, 2 El. & B. 216; Bowen v. Hall, L. R. 6 Q. B. Div. 333; Walker v. Cronin, 107 Mass. 555.

But it is manifest that the declaration in this case is bad for misjoinder. It states two distinct and independent causes [377] of action in one count, one for damage for the interference with plaintiff's property right and the other for damage to reputa-

tion: Northern Cent. Ry. Co. v. Mills, 61 Md. 358; Cheetham v. Tillotson, 5 Johns. 430; Stirling v. Garritee, 18 Md. 474; Baltimore etc. R. R. Co. v. Ritchie, 31 Md. 198.

As we have seen, the first is a good cause of action, but the second, which seeks to recover for "the disgrace and disrepute into which plaintiff was brought on account of the advertising and sale," et cetera, is clearly demurrable. It is well settled that no action will lie for words spoken or written in the course of giving evidence or for words spoken or written in the course of any judicial proceeding: Bartlett v. Christhilf, 69 Md. 225.

We are, therefore, of opinion that the demurrer to the declaration was properly sustained, and the judgment will be affirmed, but inasmuch as the declaration contains a good cause of action, the cause will be remanded, with leave to the plaintiff to amend, the costs to abide the result of this suit.

PLEADING — JOINDER OF CAUSES OF ACTION.—Where a complaint in tort contains two or more distinct causes of action in one count, it is duplicity under the code. The remedy is by motion to strike out, and not by demurrer: Rogers v. Smith, 17 Ind. 323; 79 Am. Dec. 483, and note. See Mooney v. Kennett, 19 Mo. 551; 61 Am. Dec. 576; Jones v. Steamship Cortes, 17 Cal. 487; 79 Am. Dec. 142; Times Publishing Co. v. Everett, 9 Wash. 518; 43 Am. St. Rep. 865.

LIBEL—WORDS USED IN JUDICIAL PROCEEDING.—Proceedings in courts of justice, legislative proceedings, and petitions and memorials to legislatures are absolutely privileged, and cannot be made the basis of an action for libel: Runge v. Franklin, 72 Tex. 585; 13 Am. St. Rep. 833, and note. The parties to an action are privileged from suit for accusations made in their pleadings, because the latter are addressed to courts where the facts can be fairly tried, and to no other readers: Park v. Detroit Free Press Co., 72 Mich. 560; 16 Am. St. Rep. 544.

BAGBY & RIVERS COMPANY v. RIVERS.

[87 MARYLAND, 400.]

NAME OF ANOTHER, ASSIGNABILITY OF THE RIGHT TO USE.—A partner who, on the dissolution of a partnership, has acquired from the retiring partner the right to continue business in the name of the old firm, included in which was the name of the retiring partner, cannot assign that right to a corporation formed to continue the same business.

INJUNCTION WILL ISSUE AGAINST THE UNAUTHORIZED USE OF ANOTHER'S NAME in the conduct of a business, though he is not alleged to have been damaged by such use.

CONTRACT NOT TO ENGAGE IN BUSINESSS, CONSTRUCTION OF.—A contract that R. will not engage in a specified business so long as B. continues therein terminates when B. forms a corporation and transfers the business to it. Thereafter he is not conducting the business, and hence R. may enter into a like business on his own account.

William A. Fisher and Frank Gosnell, for the appellant.

Edgar A. Gans, Vernon Cook, B. H. Haman, and Sappington & Rivers, for the appellees.

[419] BRISCOE, J. This was a bill in equity, filed on the 22d of April, 1897, in the circuit court of Baltimore City, by the plaintiff, Arthur D. Rivers, for an injunction to enjoin the defendant, the Bagby and Rivers Company, of Baltimore City (a corporation), from using the name "Rivers" as a part of its corporate title. Subsequently, on the 13th of August, 1897, a cross-bill was filed by the defendant corporation against the plaintiff, Rivers, and the Rivers Furniture Company, to restrain Rivers from conducting the furniture business in the city of Baltimore, either in his own name or in the name of the Rivers Furniture Company, and, further, to enjoin the Rivers Furniture Company from using the name of Rivers, as a part of its title, in the conduct of the furniture manufacturing business.

The facts of the case are substantially as follows: The plaintiff, Rivers, and Charles T. Bagby had been for many years engaged in the manufacture and sale of furniture in Baltimore City, under the firm name and style of Bagby & Rivers. On the 1st of January, 1894, the copartnership existing between the members of this firm was dissolved by mutual agreement. The articles of dissolution were evidenced by a written agreement and a memorandum of sale. By the express terms of the agreement, it is provided that Bagby shall have and own in his own right, free and clear of any interest or claim of Rivers, all the stock, furniture, et cetera, in the factory and warehouse owned by the firm; and, in addition thereto, the goodwill of the firm and all business rights thereto belonging. And it further provides that "the said Rivers hereby agrees and covenants that he will permit the said Bagby to continue the use of his name, in the style of said firm; provided, however, it be so used, after such necessary legal notice to be given by the said Bagby, as not to make the said Rivers liable for or chargeable with any of the debts or contracts of said business as hereafter to be conducted by said Bagby. And the said Rivers agrees and covenants that he will not engage in the manufacture [420] of furniture in the city of Baltimore, so long as the said Bagby shall continue said business." And in the memorandum of sale, which was executed by Rivers on the same day of the agreement of dissolution, it is further provided that in addition to the assignment of the stock of goods, et cetera, "the

good will of the firm and all business rights thereto belonging or anywise appertaining shall be sold to Charles T. Bagby. It being the intention of said Rivers to sell to Bagby his entire interest in the business as now conducted by said firm." It further appears that Bagby continued to carry on the furniture business under the firm name of Bagby & Rivers, until March 16, 1897, when he and others formed a corporation under the general laws of this state, called "The Bagby and Rivers Company of Baltimore." He then assigned and transferred the business of Bagby & Rivers to this new company, and continued to carry on the furniture business under the name and style of the Bagby and Rivers Company.

On July 7, 1897, the plaintiff, Arthur D. Rivers, formed a corporation called the Rivers Furniture Company of Baltimore City, and has been since that date conducting the furniture business. And from a decree enjoining the defendant, Bagby and Rivers Company, from using the name Rivers and dismissing the appellant's cross-bill, this appeal has been taken.

There can be no question, it seems to us, that under a proper construction of the articles of dissolution between the parties and the memoranda of sale, signed in execution of this agreement, that the right to use the name Bagby & Rivers was conferred upon Bagby so long as he continued the business in the style of the old firm. This was clearly the intention of the parties, as will appear from the language of the agreement itself, which is, "and the said Rivers hereby agrees and covenants that he will permit the said Bagby to continue the use of his name in the style of said firm; provided, however, it be so used, after such necessary legal notice to be given by said Bagby, as not to make the said [421] Rivers liable for or chargeable with any of the debts or contracts of said business, as hereafter to be conducted by said Bagby."

But the appellants contend they not only had a right to the use of the name Bagby & Rivers so long as the old firm existed, but they had the right to legally assign the name Rivers to the corporation Bagby and Rivers Company. This brings us to the main question in the case, and that is as was stated by the court below: Has a continuing partner who has acquired the right to use the name of a retiring partner, either by a grant in express terms or by legal inference arising from the purchase of the goodwill of the old firm, the right to assign the use of the retiring partner's name to a corporation formed for the purpose of continuing the same business?

We are of the opinion, after a careful examination, that the contention of the appellant in respect to the assignability of the rights under this contract cannot be sustained, either from the intention of the parties, as manifested by the agreement itself, or by the law applicable to the case. In the case of Arkansas Smelting Co. v. Belden Co., 127 U. S. 387, Mr. Justice Gray, in delivering the opinion of the supreme court, says: "Everyone has a right to select and determine with whom he will contract and cannot have another thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'" And in that case, the court adopts the rule laid down by Pollock on Contracts, 425: "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided."

In the case of Horton Mfg. Co. v. Horton Mfg. Co., 18 Fed. Rep. 817, a case involving the same question as is here presented, the court said: "There is certainly no [422] authority for the proposition that a partnership whose name consists in whole or in part of the name of a person who is not a member of the firm, can, without the consent of the owner, transfer the right to another company or corporation to make a like use of such name. A man might willingly forego the use of his name in favor of an ordinary partnership, which, whether limited or not to a definite term of existence, is liable upon many contingencies to come to an end, but from such a ground there could not reasonably be inferred an intention to authorize a transfer or assignment to other companies or corporations, whereby the owner might be perpetually deprived of the control of his own name.

We will not stop to distinguish the many cases upon this question, because it would extend this opinion to an unusual length, but will simply state the conclusion reached by the courts on the subject. It is this: Where the contract is for the sale of or the right to use a fictitious name, or a trade name or a trade mark, or a corporate name, though composed of individual names, or where the goodwill of a business includes the right to use names of that character, then such right is assignable by the purchaser and follows the business. But where the contract merely gives to one person the right to use the name of another,

as in this case, such right is personal, and, in the absence of an express stipulation, cannot be assigned or transferred by the purchaser to a third party. In this case, it was stipulated that Bagby should have the right to continue the business under the old name of Bagby & Rivers. It was not agreed that Bagby and his executors, administrators, or assigns or a corporation, but in the language of the contract, "he will permit the said Bagby to continue the use of his name in the style of the firm." If more had been desired, it should have been agreed upon and expressed in the contract. This court cannot infer from the language used that Bagby was entitled to transfer to a corporation the right which Rivers had conferred upon him personally. On the [423] contrary, we think the meaning of the contract between the parties is, that so long as Bagby continued to conduct the business in the firm name of Bagby & Rivers he had the right to use the name Rivers, but when this stopped the right to use the name of Rivers also ceased.

We come, then, to the second proposition relied upon by the appellants, and that is the right of the appellees to an injunction. This is resisted upon the ground that no damage has been alleged and no injunction will lie unless injury has been shown. In the case of Plant Seed Co. v. Michel Plant and Seed Co., 37 Mo. App. 313, it is said that when a person or business corporation has assumed the name of some other firm or corporation in the same line of business, or has adopted a name which so closely resembles that of a business rival previously established that the business of the latter is liable to be diverted and the public deceived on account of it, it has always been recognized as within the power or jurisdiction of a court of equity to restrain such person or new company from conducting business under the name assumed to the detriment of the older company. And in Du Boulay v. Du Boulay, L. R. 2 P. C. 441, this question is thus determined: "In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law, and any person using that name after a relative right of this description has been acquired by another is considered to have been guilty of a fraud, or at least, an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction." And to the like effect are the cases of McGowan v. McGowan, 2 Cin. Rep. 320; Williams

v. Farnand, 88 Mich. 473; Hohner v. Gratz, 52 Fed. Rep. 871; Landreth v. Landreth, 22 Fed. Rep. 41; Holmes v. Holmes, 37 Conn. 295; 9 Am. Rep. 324; Beach on Injunctions, sec. 760; Brown Chemical Co. v. Meyer, 139 U. S. 544. There was [424] no error then in the decree enjoining the Bagby and Rivers Company from using the name Rivers as part of the corporate name of the corporation.

The remaining contention urged by the appellants arises under the cross-bill, which was dismissed by the court below, and involves a construction of that part of the agreement which reads, "and the said Rivers agrees and covenants that he will not engage in the manufacture of furniture so long as said Bagby shall continue said business."

It is clear, we think, according to the meaning of this part of the contract, that when Bagby formed a corporation, assigned to it all the rights of the old firm and ceased to do business as Bagby & Rivers, he was not conducting and continuing the old business, and that Rivers was entitled to resume the furniture business himself. We fully agree with the learned court below, when it says, "that under the provisions of the contract Rivers has a full right to engage in the business, if Bagby quits it, and I do not see how it can well be contended, that, if Bagby abandons the business himself as an individual and transfers all his rights to the defendant corporation, assuming to assign to it also the late firm name, that Bagby can still be considered as conducting a business which is absolutely that of the corporation to which he has transferred it. It is no longer Bagby who is doing the business, but the corporation, no matter if he does have an interest in the latter." For these reasons the decree will be affirmed.

TRADEMARKS—ASSIGNMENT—NAME OF ASSIGNOR AS PART OF.—Numerous cases affirm that a man may part with his right to use his own name as part of a trademark, and that thereafter the courts of equity may not prevent his assignee from using such name, but will compel the assignor to observe his assignment and the covenants therein contained, by which he binds himself not to use his own name in connection with any business of the same character as that which he has transferred: Extended note to Symonds v. Jones, 17 Am. St. Rep. 497, discussing this subject.

INJUNCTION AGAINST USING ONE'S NAME—TRADE-NAMES.—An injunction will be granted against the use of the name, mark, or label of the complaintant, where such use is designed to induce the belief that an article manufactured by the defendant is one manufactured by the complainant: Taylor v. Carpenter, 11 Paige, 292; 42 Am. Dec. 114. See extended note to Popham v. Cole, 23 Am. Rep. 27-30.

CONTRACTS NOT TO ENGAGE IN BUSINESSS—CONSTRUCTION—BREACH.—A contract not to engage in a certain business in a certain place, entered into by one who has sold his business to another, will be construed as binding during the life of the contractor: Kramer v. Old, 119 N. C. 1; 56 Am. St. Rep. 650, and note. As to what constitutes a breach of such agreement, see Duffy v. Shockey, 11 Ind. 40; 71 Am. Dec. 348, and note; Smith v. Martin, 80 Ind. 260; 41 Am. Rep. 806; Harkinson's Appeal, 78 Pa. St. 196; 21 Am. Rep. 9.

CASTLEMAN *v.* TEMPLEMAN.

[87 MARYLAND, 546.]

CORPORATION, JUDGMENT AGAINST IN ANOTHER STATE, EFFECT OF ON NONRESIDENT STOCKHOLDER.—A decree or judgment against a corporation making an assessment on its capital stock is binding on all its stockholders, whether or not they are residents of the state or parties to the suit, to the extent of determining the necessity for, and the amount of, the assessment.

CORPORATIONS, CREDITORS, RIGHT OF TO SUE FOR SUBSCRIPTIONS.—Where a creditor of a corporation has obtained a decree against it that assessments be made against specified stockholders and that they pay the amounts thereof to a receiver named, such creditor cannot maintain an action upon such assessment, though the decree further declares he is entitled to all moneys to be collected thereon, because, by the terms of the decree, a right of action is vested exclusively in the receiver, or in the name of the corporation for his use.

A RECEIVER APPOINTED IN ANOTHER STATE FOR AN INSOLVENT CORPORATION may, in this state, maintain an action in its name upon a liability due it. Through comity between states a representative of a court of one state will be permitted to sue in the courts of the other when the suit does not injuriously affect the interests of the citizens of the latter nor violate its policy or laws.

RECEIVER—MAKING HIM A PARTY DEFENDANT WHEN HE SHOULD HAVE BEEN A PLAINTIFF.—When the right to sue for assessments on the capital stock of a corporation has, by a decree, been vested in a receiver, a creditor suing upon such assessment cannot, by making the receiver a party defendant, maintain the action.

A RECEIVER DESIRING TO BRING SUIT IN ANOTHER STATE than that in which he was appointed should file a petition in the court in which he wished to bring his action, stating the proper facts and asking leave to sue therein.

Michael A. Mullin and Alfred Bagby, Jr., for the appellant.

Thomas Ireland Elliott and Frederick T. Dorton, for the appellees.

547 BOYD, J. The appellant, as a creditor of the Salem Loan and Real Estate Investment Company, a corporation chartered under the laws of the state of Virginia, filed the bill in equity in this case to enforce payment of subscriptions to the

stock of that company, alleged to have been made by James A. Templeman and Thomas A. Bryan, who were residents of this state. James A. Templeman having died before the bill was filed, his executors and his wife, who was residuary legatee for life under his last will and testament, were made parties. The decree below having dismissed the bill of complaint as to them, the appellant took this appeal, and, the decree being in her favor against Thomas A. Bryan, he took an appeal which will be disposed of in the next succeeding case. The appellant obtained a judgment against the company in the circuit court of Roanoke county, Virginia, and afterward filed a bill in equity in that court, which resulted in a decree establishing an indebtedness due her by the company on the judgment of over seven thousand dollars, and appointed A. B. Pugh receiver, directing him to take charge of all the assets of the company (excepting the real estate which was sold by a trustee named in a deed of trust and only realized a few hundred dollars), and to collect the unpaid subscriptions from the resident stockholders who were named, together with the amounts due by each. Shortly afterward another decree was entered which confirmed a report of the receiver, which stated that he had collected one thousand and fifty dollars from two resident stockholders, and had paid over to the plaintiff the balance, after deducting costs, and had issued executions against the other resident stockholders which had been returned "no effects." It was then further decreed that the several nonresident stockholders of the company, as shown by the report of a commissioner previously filed in the case, pay to said A. B. Pugh, receiver, the amounts due by them respectively as follows: T. A. Bryan the sum of three thousand three hundred dollars, J. A. Settle the sum of two thousand five hundred and four dollars, and J. A. Templeman the sum of one thousand two hundred and fifty dollars— [548] the two decrees including all the stockholders, and the assessments being for the entire amount of subscriptions unpaid. The decree further provided that "said A. B. Pugh, receiver, is authorized to collect said several sums of money, and to sue for the same in any proper court or courts having jurisdiction of the person or property of the parties owing the same, whether in this state or any other state, district, or territory of the United States. And said receiver shall report to the court."

The evidence shows that the amounts stated above were still due on stock in the name of Messrs. Templeman and Bryan, but it is denied that J. A. Templeman ever subscribed for the stock.

The directors of the company had made several assessments, amounting in all to fifty per cent of the stock, which had been paid, leaving the above amounts still due, as claimed by the appellant. The court below held that J. A. Templeman had not subscribed or ratified the subscription in his name. From the view we take of the case it will be unnecessary to discuss that question, as well as some others that were argued. Neither Templeman nor Bryan were served with process in the Virginia court, although they were made parties and proceeded against by an order of publication, and hence there could be no valid decree in personam against them, but in the case of Glenn v. Williams, 60 Md. 93, this court held that a decree of the Virginia court making assessments on stock of a Virginia corporation, held by stockholders who were not parties to the suit, was valid and binding on them, both as to the necessity for the assessment and the amount thereof. It was there said that "when the court obtained jurisdiction of the corporation, every stockholder, in his corporate capacity, was a party to the cause, and was supposed to be represented by the president and directors, who were intrusted with the management of the corporate interest of all the stockholders"; and again it was said: "The judgment is conclusive as against the corporation and its property, and upon principle those who hold its property or funds for the [549] payment of debts ought to be concluded, except where there has been fraud or collusion." That decision has been distinctly approved of by the supreme court of the United States in Hawkins v. Glenn, 131 U. S. 330, and other cases in this state, as well as elsewhere. Of course, it does not decide that one who is alleged to be a stockholder is precluded by such a decree, in a case to which he was not personally a party, from showing that he was not a stockholder or that he had actually paid for the stock subscribed for by him, but when the fact is established that he is the owner of stock liable to assessment, which is not paid in full, the assessment made by a court of equity having jurisdiction over the corporation is binding on him. In the absence of authorized assessments by the president and directors, the court has the power to make them, and until they are made the stockholders are not called upon to pay. The authority of the president and directors to make assessments is the same in this case as it was in Glenn v. Williams, 60 Md. 93—the statute requiring a payment of two dollars upon each share at the time of subscribing, and the residue as required by the president and directors. The appellant, having obtained the

decree from the Virginia court thus establishing the amount to be paid by each stockholder, being the balance of the unpaid subscriptions, filed this bill on behalf of herself and any other creditors of the company, who may make themselves parties and contribute to the costs of the suit.

In her bill filed in Virginia she alleged that there was no other creditor, and as the decree of that court directed the money collected to be paid over to her, she apparently satisfied that court that such was the case. It is not contended that there are any creditors residing in this state, and we understand it to have been conceded that the appellant did not reside here. The important question, therefore, for us to decide is, whether the appellant, after obtaining such a decree in the Virginia court as we have referred to, can now sue in her own name to recover the amount of the unpaid subscriptions alleged to be due by Thomas A. Bryan [550] and the estate of J. A. Templeman. The bill alleges that the receiver made demand upon the executors of Templeman and on Bryan for the balance alleged to be due by them respectively, but they refused payment, and that the receiver has taken no further steps to collect them, although it is not alleged that he was unwilling or unable to do so. So far as we are informed, and indeed it is so stated in the brief of the appellant, there is no statutory remedy in Virginia in favor of creditors directly against stockholders for unpaid subscriptions. The right of the appellant, therefore, to proceed against them must depend upon the principle established by courts of equity, that unpaid subscriptions to stock of an insolvent corporation constitute a trust fund for the payment of debts, and that, notwithstanding the company may have failed to make a call or assessment, a court of equity can make its own call for such amount of the unpaid subscriptions as is necessary to pay the debts. The appellant went into the Virginia court and asked for the appointment of a receiver to take charge of the assets of the company, including the unpaid subscription to its capitalstock, and that the stockholders of the company "after they shall have been definitely ascertained, and their respective liabilities in the premises determined, may be required to pay to such receiver or to some one especially appointed by the court for the purpose, so much of their unpaid subscriptions, respectively, as may be found necessary to pay the plaintiff's said judgment and the costs of this suit." That court granted her prayer, made the assessments relied on as the basis of this proceeding, but, in doing so, expressly directed

that they should be paid to A. B. Pugh, receiver, and authorized him to sue for them. That decree, as we have said, is binding on and conclusive against the stockholders to the extent of determining the necessity for and the amount of the assessment, and until the assessment was made there was no unconditional liability on the stockholders who had paid the calls made by the president and directors. But the appellant having obtained a decree in a court of competent [551] jurisdiction, by which the receiver, and not herself, is authorized to collect the amounts due by the stockholders, as fixed by the assessment of the court, her right to sue for them is merged in that decree. Payment to the receiver would have been an absolute bar to her recovery, and he undoubtedly has the privilege of suing in any court which will recognize his authority. The only possible ground that she can now have to sue in another court must be the inability of that receiver, or anyone appointed in his place, if he decline or fail to act, to enforce the collections. In that event she might have some standing in a court of equity, but when her suit is founded on a decree, obtained at her instance, which directs the assessment made to be paid to another person, as an officer or representative of the court, the inability of the latter to proceed should certainly be definitely and clearly established in order to enable her to maintain the proceeding in her own name. Has that been done in this case?

That the receiver could have instituted suits in the name of the company, for his use, would seem to be clear. Whilst the company is shown to be insolvent, it has not been dissolved so far as the record discloses. If it has not been dissolved, or if it has been and the Virginia law authorizes suit to be brought by the receiver, in the name of the company, there is express authority for such proceeding in this state in the case of Lycoming Fire Ins. Co. v. Langley, 62 Md. 196. In that case, a receiver had been appointed in Pennsylvania and assessments had been made on a premium note given to the insurance company by which the defendant promised to pay the amount named "in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require." One of the assessments was made after the receiver was appointed by the Pennsylvania court, and this court held that the action could be maintained in the name of the company. We can see no distinction in principle between that case and this, so far as [552] the right of the receiver appointed by the court of another state to sue—making the company the legal plaintiff.

Many authorities have held that, unless otherwise provided by statute, a receiver must sue in the name of the party over whom he has been appointed, if the legal title has not been formally assigned to him, and although in this state a receiver can sue in his own name, if so authorized by the court, he can also sue in the name of the original party: State v. Wilmer, 65 Md. 178; Lycoming Fire Ins. Co. v. Langley, 62 Md. 196.

But under the circumstances of this case, the receiver was not confined to that method of proceeding. We understand it to be conceded that there are no creditors of this company residing in this state, and, if not conceded, there is no allegation in the bill, or even suggestion in the testimony or other part of the record, that any of the citizens of this state are interested in the distribution of the assets of this company. The courts of this state had not taken jurisdiction over the subject matter of this suit or any of the property of the defendant, when this bill was filed. The subscriptions alleged to be due by Templeman and Bryan must be treated as Virginia contracts, as they were to be performed there and the rights and liabilities of the parties under them are to be determined by the law of that state: Fear v. Bartlett, 81 Md. 435, 446. The Virginia court had jurisdiction over the subject matter and has exercised it as far as it could in that state. Under these circumstances, we can see no reason why the receiver should not be permitted to sue here—not because he, as a matter of right, can demand recognition in this state, but through comity between the states, which should permit the representative of the court of one state to sue in another, when such suit does not injuriously affect the interests of the citizens of the latter, or violate its policy or laws. It is true that as a general rule the functions and powers of a receiver, for the purpose of litigation, are limited to the courts of the state within which he has been appointed and that he has no extraterritorial [553] jurisdiction, and that such rule has been more than once announced by this court: Bartlett v. Wilbur, 53 Md. 485; Lycoming Fire Ins. Co. v. Langley, 62 Md. 196; Day v. Postal Tel. Co., 66 Md. 354. But as is said in 20 American and English Encyclopedia of Law, 244, in referring to the exception to this general rule: "The authorities supporting this exception are so numerous and the language of the courts so favorable to its extension, that it seems certain the exception will soon, if it has not already, supersede the general rule." In Bartlett v. Wilbur, 53 Md. 485, and Day v. Postal Tel. Co., 66 Md. 354, this court recognized the fact that there were excep-

tions to the general rule, but in those cases the exceptions did not apply, as the exercise of the jurisdiction of the courts of this state had been previously invoked in regard to the same subject matter. In the case of Hurd v. Elizabeth, 41 N. J. L. 1, the question is very fully and ably considered. The decision of the supreme court of the United States in Booth v. Clark, 17 How. 322, which has been followed by courts adopting the general rule, including our own, is fully recognized by the supreme court of New Jersey, which held that although a receiver could not sue or otherwise exercise his functions, in a foreign jurisdiction, if such acts would interfere with the policy of the law in the foreign jurisdiction, or be to the detriment of resident creditors, yet "after completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided." To the same effect are the cases of Bank v. McLeod, 38 Ohio St. 174; Gilman v. Ketcham, 84 Wis. 60; 36 Am. St. Rep. 899, where there is an excellent note on the subject; Boulware v. Davis, 90 Ala. 207; Bagby v. Atlantic etc. R. R. Co., 86 Pa. St. 291; Mitzner v. Bauer, 98 Ind. 427; Pugh v. Hurtt, 52 How. Pr. 22; Patterson v. Lynde, 112 Ill. 196, and other cases cited in 20 Am. & Eng. Ency. of Law, 241-245.

It will be seen from an examination of those cases that [554] the tendency is to recognize the exception to the general rule, and to apply it when it can properly be done within the lines indicated above, and we are of opinion that the exception is a proper one and will often promote the ends of justice without in any way being in conflict with the previous decisions of this court. Of course, we do not mean that the privilege shall be granted to a foreign receiver to sue for all kinds of property, but for a debt of the character of that before us we can see no reason why he should not be recognized and aided by our courts under such or similar circumstances as those disclosed by this record, to which we have referred. The appellant has undertaken to meet this by saying that the Virginia receiver was made a party defendant to this bill and has answered, consenting to a decree, but that will not do. The receiver is an officer of the court which appointed him and is subject to its orders. He is by the decree appointing him expressly required to report to that court. It would seem to be clear, then, that he has no authority to bind the Virginia court, or right to thus relieve himself of the duty assumed by him. Besides, we have said the

appellant has no standing in the court to institute proceedings of this kind, because her right to proceed individually against the stockholders has been merged in the decree, obtained by her, directing the receiver to collect the very debts she now seeks to collect. She, therefore, cannot maintain the suit herself, nor can she confer on herself the right to sue the Templemans and Bryan by joining the receiver with them as codefendant. The proper course for her to pursue is to require the receiver to proceed, or, if he refuses to do so, to have another person appointed who will obey the order of the court appointing him.

It will not be out of place to say that when a receiver appointed by the court of one state desires to sue in a court in another state, it would be a proper practice for him to file a petition, setting forth such facts as we have indicated [555] as sufficient to enable him to do so in the latter court, asking permission to sue.

As we are of opinion that the bill of complaint must be dismissed on the grounds we have stated, it will not be necessary to discuss the other questions raised. Indeed, as it is intimated in the brief of the appellant that additional evidence can be obtained as to whether J. A. Templeman did subscribe for the stock, and as the evidence does not clearly show whether the notice to creditors was given by his executors before they settled their final account, relied on as a bar in this proceeding, we deem it proper not to pass on those questions, but will for the reasons we have given affirm the decree dismissing the bill in this case.

CORPORATIONS — JUDGMENT AGAINST — CONCLUSIVENESS UPON STOCKHOLDERS.—A valid judgment against a corporation binds the stockholders in respect to corporate matters: Bear v. Board of County Commrs., 122 N. C. 434; 65 Am. St. Rep. 711; Ball v. Reese, 58 Kan. 614; 62 Am. St. Rep. 638; Holland v. Duluth Iron etc. Co., 65 Minn. 324; 60 Am. St. Rep. 480. A corporation represents and binds its stockholders in all matters within the limits of its corporate powers so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligations of the corporation it binds the stockholders as fully as in the making of contracts: Nickum v. Burkhardt, 30 Or. 464; 60 Am. St. Rep. 822, and note; monographic note to Thompson v. Reno Savings Bank, 3 Am. St. Rep. 814.

RECEIVERS—FOREIGN—SUITS BY.—As a general rule, a receiver appointed by the court of one state has no power, as a matter of right, to bring suits regarding matters pertaining to his receivership in the courts of other states: See extended note to Straughan v. Hallwood, 8 Am. St. Rep. 49. State comity does not require the courts of one state to permit receivers appointed by the court of another state to exercise privileges detrimental to the citizens of the former while pursuing legal remedies there: See monographic note to Alley v. Caspari, 6 Am. St. Rep. 185. See Parker v. Stoughton Mill Co., 91 Wis. 174; 51 Am. St. Rep. 881.

CROWN CORK AND SEAL COMPANY *v.* STATE.

[87 MARYLAND, 687.]

CORPORATION, TAX UPON STOCK OF, WHEN NOT A TAX AGAINST THE CORPORATION.—If the taxable value of the stock of a corporation is first fixed, and there is then deducted therefrom the aggregate value of the real property owned by the corporation and the residuum divided by the number of shares of stock, and the quotient declared to be the taxable value of each share for state purposes, and upon the value thus ascertained a state tax is levied, this is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the tax and the corporation is required to pay it, being entitled to be reimbursed by the stockholders.

PATENT RIGHTS—TAXATION OF.—If a corporation has valuable patent rights, the whole value of its capital stock is subject to taxation, however much enhanced by its ownership of such rights. The constitution of the United States does not compel any reduction in the amount of taxes because of such rights.

William A. Fisher, M. E. Olmstead, and Robert H. Parkinson, for the appellant.

John V. L. Findlay, city counselor, and Leon E. Greenbaum, city attorney, for the appellee.

[693] ROBERTS, J. This suit was brought by the state of Maryland in the court of common pleas of Baltimore City to recover from [694] the appellant certain taxes assessed upon its capital stock and claimed to be due the state for the year 1895. The case was tried before the court below, without the aid of a jury. At the trial below, the state, appellee here, offered in evidence the tax bill properly certified, when it was admitted that the state tax commissioner had duly assessed the capital stock of the appellant, for the year 1895, and that the appellant, refusing to abide by the action and determination of the tax commissioner, took its appeal to the comptroller and treasurer of the state, in accordance with the provisions of the code, and it is conceded that the assessment on which the taxes are claimed is in accordance with the valuation fixed by the treasurer and comptroller on such appeal. The appellee then closed its case, and the appellant offered evidence of similar character to that of the appellee, showing the valuations of its stock as made by the tax commissioner and on appeal by the comptroller and treasurer, and that the same are proper evidence of the facts stated. The appellant, as shown by the record, was incorporated on the 9th of March, 1892, under the general incorporation laws of the state of Maryland, for the purpose of "acquiring, developing,

improving, using, working, or otherwise utilizing and disposing of the patented inventions, following, for which patents have been granted in the United States and Canada"; then follows a list of the patents referred to, which do not require enumeration here. The appellant transacts its business in this state and elsewhere, and owns real and personal property other than the patent rights mentioned herein. The aggregate authorized capital stock of the appellant is one million dollars, divided into ten thousand shares of the par value of one hundred dollars each. The charter of the appellant, in express terms, provides that "the said corporation is formed upon the articles, conditions, and provisions herein expressed and subject in all particulars to the limitations relating to corporations, which are contained in the general laws of this state." The appellant also offered evidence to show the [695] minutes of a meeting of its shareholders on the 10th of March, 1892, at which all of its stock was subscribed for, except four hundred and ninety-five shares, and paid for by a lot and factory and chattels to the value of fifty-seven thousand seven hundred and ninety-one dollars and nine cents and the assignment of valuable United States patents, claimed to be essential to the business of the appellant, and it was further proved that the Canadian patents were never used by it, and that it has never engaged in the manufacture of its patented product in Canada.

The aforegoing statement substantially presents the facts essential to a proper understanding of the nature and character of the controversy arising on this appeal. The appellee offered one instruction in the court below, which was granted, and sought to exclude certain testimony, by means of four motions offered for that purpose, each of which was overruled by the court. The appellant offered six prayers, all of which were rejected except the fifth, which was granted. The finding and judgment being against the appellant, it prosecutes this appeal.

The questions here presented are important to the interests of both parties. Important to the appellee, not only because its revenues are affected by the determination of the issues here presented, because it adopts and declares the rule of law to be adhered to in all cases of like character with the one now under consideration. It is clearly important to the appellant by virtue of the fact that it involves the question of its liability for the payment, vel non, of the taxes assessed upon a large and valuable property, which the court of last resort of an adjoining sister state, whose decisions are entitled to and receive the high-

est consideration by this court, has declared adversely to the contention of the appellee advanced and sought to be maintained on this appeal.

The leading question which this appeal presents is whether, in the assessment of the capital stock of the appellant company for purposes of taxation, the appellant is entitled to have the assessment limited to the value of the [696] property other than the patents granted by the United States. There is another question closely interwoven with the main proposition just stated, and will be considered in the course of this opinion, which relates to the constitutionality, both federal and state, of the contention of the appellee. It will not be necessary to burden the report of this case with the various provisions of the code relating to the taxation of the shares of stock of corporations incorporated under the laws of this state, as they are lengthy and can be conveniently found by reference to sections 2, 4, 141, and 144 of the code, contained in article 81.

Mr. Chief Justice McSherry, speaking for this court in the case of United States Electric Power etc. Co. v. State, 79 Md. 70, has forcibly said that: "The taxable value of shares of capital stock is fixed by the state tax commissioner. He is required by the statutes to deduct from the aggregate value of all the shares of the capital stock of banks and other corporations the assessed value of the real estate owned by the company, and to divide the residuum by the number of shares of the stock, and the quotient is declared to be taxable value of each share for state purposes of taxation. Upon the valuation thus ascertained the state tax is levied. But the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and under existing laws are taxable property. They belong to the stockholders respectively and individually, and when, for the sake of convenience in collecting the tax thereon, the corporation pays the state tax upon these shares into the state treasury, it pays the tax not upon the company's own property, nor for the company, but upon the property of each stockholder and for each stockholder respectively, by whom the company is entitled to be reimbursed. Hence, when the owner of the shares its taxed on account of his [697] ownership and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all."

This statement of the law recently announced by this court gives to the statute a construction so clear and free of doubt that no suggestion of uncertainty can fairly arise as to its meaning and effect. Under the sections of the code just referred to, the taxes in controversy here have been levied and assessed without regard to the value of the United States patents. The state tax commissioner has, in the proper discharge of his official duty, assessed the value of the shares of stock in the appellant corporations, and has certified and returned said valuation and assessment to the comptroller of the treasury, who has duly notified the appellant of such valuation and assessment, and upon appeal the comptroller and treasurer have corrected the same and made their final valuation and assessment, which is final and absolute unless they shall have committed some error in the discharge of their official duties. It is insisted that they have erroneously valued and assessed the patent rights in question, and this is the chief grievance of the appellant. But why should not the shares of stock in the appellant corporation be valued and assessed and taxes paid thereon? The number of corporations incorporated under the laws of this state, engaged in business here, employing vast sums of money and possessed of extensive property rights, is almost unlimited, and yet most of them, in the proper and successful management of their business, have been compelled to purchase and use patent rights, to enable them to compete successfully with other corporations engaged in a similar business. They are without exception compelled to pay taxes on their shares of stock levied and assessed in like manner with those in controversy here. It is a total misconception of the object sought to be maintained on this appeal to assert that this is an effort to tax patent rights. It is not, however, necessary to the determination of the rights involved in this controversy, to decide any such question. [698] It is a proposition about which there is no lingering doubt, that patent rights are personal property and entitled to the same protection as any other property: Cammeyer v. Newton, 94 U. S. 225; and it will remain for future consideration whether a patent right may not of itself be a proper subject of taxation, but that, as just stated, is not a question necessary to be decided on this appeal. It has been elsewhere maintained that a patent right resembles a franchise in being a privilege which concerns, and is intended to benefit, the public, which depends for existence and preservation upon the authority which confers it. It has also been argued in the hearing of this appeal that a patent contains a bargain made with

the government and the patentee, to be judged like other bargains. Conceding both propositions to be correct, how does either tend to affect the questions under consideration here? To say that the shares of stock of a corporation incorporated under the laws of this state cannot be taxed because the corporation enjoys certain franchises, the very use of which enables it to successfully carry on its business, would be to strike down our entire system of taxation relating to corporations. And even if it be true that a patent right exists through the medium of a contract with the federal government, its only effect upon the value of the shares of stock of a corporation, which are unquestionably taxable, is to aid in the development of the business interest of such corporation, and largely multiply the chances of its successful management. So that it is not a question as to how the value of the shares of stock of such corporation have been enhanced, whether by the aid of patent rights, or by the sale of the manufactured product obtained by the use of such patent rights, or by the superior business qualifications of the agents of the corporation, who manage and control its affairs. It matters not how numerous nor how valuable its patent rights might have been at the inception of the appellant's business enterprise, the shares of its stock would now be comparatively valueless had not other agencies, [699] forceful and active, put life and energy into the undertaking. The supreme court of Ohio, speaking with respect to the meaning of the patent laws of the United States, and quoted with approval in Patterson v. Kentucky, 97 U. S. 506, says: "The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent." In the granting of patents, the federal government has never sought to do more, and in fact, has never exercised greater authority, than to extend protection to the privilege, such as that granted by a patent for an invention, against the infringement of those who seek to invade it. A patent right, in its usual signification, means a privilege granted by the government to the first inventor of a new and useful discovery or mode of manufacture that he also shall be entitled, during a limited period, to the exclusive use and benefit thereof. After careful examination, we have failed to discover any satisfactory authority showing that the government has ever yet indicated any intention of limiting the power of the states in dealing with a subject of this kind, although involving patent rights. It is a proposition without support to seek to maintain

that patent rights are agencies or instrumentalities of the general government with which the states have no right, in any manner, to interfere: Patterson v. Kentucky, 97 U. S. 506; Webber v. Virginia, 103 U. S. 344. It is now well-settled law, as determined in Western Union Tel. Co. v. Attorney General, 125 U. S. 551, 552, that "the agencies of the federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government." In the case of Livingston v. Van Ingen, 9 Johns. 507, cited and approved in Patterson v. Kentucky, 97 U. S. 508, Chancellor Kent said that "the national power will be fully satisfied if the property created by patent be, for the given time, enjoyed and used exclusively, so far as, under the laws of the several states, the property shall be deemed fit for toleration and use. There is no need of giving this [700] power any broader construction in order to attain the end for which it is granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts." Mr. Justice Harlan, in referring to the Ohio case and the New York case just quoted from in Patterson v. Kentucky, 97 U. S. 506, and pursuing much the same line of thought, remarks that: "The right which the patent primarily secures is the exclusive right in the discovery, which is an incorporeal right, or, in the language of Lord Mansfield, in Miller v. Taylor, 4 Burr. 2303, 'a property in motion, which has no corporeal, tangible substance.' The enjoyment of that incorporeal right may be secured and protected by national authority against all hostile state legislation; but the tangible property which comes into existence by the application of the discovery is not beyond the control as to its use of state legislation, simply because the inventor acquires a monoply in the discovery."

We have given careful scrutiny to the various authorities, to which we have been referred, bearing upon the questions raised by this appeal, and have found the propositions contended for both novel and interesting. The result of our investigation is, that we have found but two cases directly bearing upon the subject of the taxation of patent rights, as such, which is not the specific question to be determined on this appeal. The case which supports the theory of the exemption of patent rights from taxation is the case of the Commonwealth v. Westinghouse Electric etc. Co., 151 Pa. St. 265. The supreme court of Pennsylvania, having filed no opinion, adopted that of the lower

court, from which we briefly quote and which sufficiently marks the distinction between the Pennsylvania case and the one now under consideration. The former case maintains that: "The tax being upon the capital stock, it is a tax upon the company's property and assets." This is not the law of Maryland, and such view is not the accepted doctrine held by the United States supreme court: Bank of Commerce v. Tennessee, 161 U. S. 146. "Taxes being made the sole means by which sovereignties [701] can maintain their existence, any claim on the part of anyone to be exempt from the full payment of his share of taxes on any portion of his property must, on that account, be clearly defined and founded upon plain language. It has been said that a well-founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power." This court, as hereinbefore referred to, has through its chief justice, in United States Electric etc. Co. v. State, 79 Md. 70, declared that: "The tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and under existing laws are taxable property."

We have referred to the one case, that of Commonwealth v. Westinghouse Electric etc. Co., 151 Pa. St. 265, which maintains the nonliability to taxation of patent rights; the case of People v. Campbell, 138 N. Y. 543, maintains a doctrine directly contrary to the Pennsylvania case. The New York case was a proceeding by certiorari to review the action of the state comptroller in imposing a tax upon the relator, the Edison Electric Light Company, a domestic corporation, under the corporation tax act. The entire capital stock of the relator was originally invested in patent rights. Corporations were formed in New York and other states, to whom the relator granted the right to use these patents, receiving in compensation stock in such corporations. It was decided that as to so much of such stock as was in corporations organized in New York, it was the capital of the relator employed in that state, and as such was a basis of taxation, but that the stock in corporations in other states was capital employed outside the state, and not taxable. It was also claimed

in that case that the relator held bonds of foreign corporations, issued to it in payment for patent right granted, and on this question it was [702] determined that so much of relator's capital as was invested in these bonds was a basis of taxation under the statute. In delivering the opinion of the court, Earl, J., said: "It is sufficiently accurate for the purpose now in hand to say that the entire capital of the relator was originally invested in patent rights. Corporations were formed in various cities of this state, and to a large extent in cities outside of the state, to use these patents, and to those corporations the relator granted the right to use the patents, and in compensation for such grants it received stock of such corporation, and during the year 1891 it held such stocks and received the dividends declared thereon. As to so much of said stocks as was in corporations organized in this state, it cannot be doubted that its capital was employed in this state. So much of its capital, to wit, its patents, as was used to purchase such stocks, was employed for that purpose, and was thus used for the business of the relator. The stocks existed within this state, and were kept and held to produce revenue here, and hence in every sense were employed within this state. They took the place, as a portion of the relator's capital, of the patent rights transferred in payment for them. The stocks which the relator took in companies organized outside of this state stood for so much of the relator's capital invested outside of the state. It took a portion of its capital, to wit, a portion of its patent rights, and employed it outside the state to purchase those stocks. Those stocks had no situs here, and were not taxable here under any system of taxation which ever existed in this state. To make such capital a basis for taxation it must have been employed within this state. It is said in this record, although not distinctly shown, that the relator also held bonds of foreign corporations, issued to it in payment for patent rights granted. We think that so much of the capital as was invested in such bonds was a basis of taxation here under the act. Those bonds were presumably held at its office in this state, and such bonds, as well as all choses in action, unless kept, employed, or [703] used outside of the state, have their situs at the domicile of the owner. The bonds took the place of the patent rights granted for their purchase. They were kept and held here to earn revenue for the relator, and they were, in a proper sense, employed here for that purpose."

We have thus presented both sides of this controversy, at

perhaps greater length than was necessary, but the question is yet in limine and may be regarded as opening a new avenue of judicial investigation. If the comptroller and treasurer have in reviewing the action of the state tax commissioner discharged their duty in accordance with the provisions of the code, under which they were acting, and we think they have, their action is final, and from it no appeal will lie.

The second contention which we are called upon to consider on this appeal is, whether there is any prohibition in the constitution of the United States compelling the appellee to make any reduction in the amount of taxes assessed on the shares of stock of the appellant by reason of certain patents granted by the federal government, and now owned by the appellant. Much that we have already said meets this objection. We fail to see how a state tax upon patent rights themselves would directly or indirectly conflict with the power conferred upon the federal government "to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries": U. S. Const., art. 1, sec. 8. The power of Congress (giving effect to this provision) goes no further than to secure to the author or inventor a right of property, which, like every other species of property, must be used and enjoyed within each state according to the laws of each state: Kent, C., in Livingston v. Van Ingen, 9 Johns. 581. This, we think, correctly announces the rule of construction which ought to be applied to the section of the constitution just referred to. We entertain no doubt as to its meaning and effect, and find the questions raised on [704] this appeal in no respect in derogation of the constitution. We find no error in the rulings of the court below, which we have treated collectively rather than separately, as we have, by so doing, been the better enabled to consider them.

It follows from the views expressed that the judgment of the court below must be affirmed.

CORPORATIONS—TAXATION UPON STOCK—EFFECT OF.—The capital stock of a corporation and the shares of the capital stock are distinct things, and both may be taxed without imposing double taxation: See monographic note to Buck v. Miller, 62 Am. St. Rep. 458; Commonwealth v. Charlottesville etc. Loan Co., 90 Va. 790; 44 Am. St. Rep. 950, and note. The personal property of a bank subject to taxation is so much of the capital stock paid in or secured as will remain after deducting therefrom the actual cost of all the real estate of the company: Bank of Utica v. Utica, 4 Paige, 399; 27 Am. Dec. 72. Stock of a corporation may be taxed to the owner, independently of taxation upon the corporate fran-

chises and property: Belo v. Forsyth County, 82 N. C. 415; 33 Am. Rep. 688; Memphis v. Ensley, 6 Baxt. 553; 32 Am. Rep. 532, and note. Compare State v. Travelers' Ins. Co., 70 Conn. 590; 66 Am. St. Rep. 138, and note.

TAXATION OF PATENTS OWNED BY CORPORATION.—It is the settled doctrine of Pennsylvania courts that the capital stock of a corporation issued for, or invested in, patents or patent rights, is not subject to taxation under state laws: Commonwealth v. Edison Electric Light Co., 157 Pa. St. 529; 37 Am. St. Rep. 747, and extended note.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

BAHEL *v.* MANNING.

[112 MICHIGAN, 24.]

NEGLIGENCE IN USE OF FIREARMS.—The act of pointing a gun at another, cocking it, and pulling the trigger, is of itself a negligent act, and the person so doing, though thinking the gun to be unloaded, is not excused from the consequences of his negligent act by reason of the care which he took prior to its commission to determine whether the gun was loaded, if in fact it was loaded and was discharged to the injury of another.

NEGLIGENCE IN USE OF FIREARMS.—A person who cocks a gun and pulls the trigger, knowing the gun to be pointed at another person, but thinking it to be unloaded, is liable in damages to such other person for whatever injury is inflicted upon him by the discharge of the gun, unless the latter is guilty of contributory negligence.

NEGLIGENCE IN USE OF FIREARMS—CONTRIBUTORY NEGLIGENCE.—One who sits within range of a gun when he knows that it is cocked and that another is about to pull the trigger, and fails to protest or get out of range, although having time to do so, is guilty of contributory negligence precluding a recovery in case he is injured by the discharge of the gun.

Action to recover for negligence. Judgment for plaintiff. Defendant appealed.

E. E. Emerick and J. H. Davitt, for the appellant.

Humphrey & Grant, for the appellee.

25 LONG, C. J. This is an action on the case for damages for injuries caused by the defendant's carelessly and negligently discharging a gun, the bullet from which passed through plaintiff's right thigh and hip, permanently disabling him.

It appears that the defendant, at the time of the accident, was

a resident of Saginaw, this State, and had gone to Otsego Lake on a hunting trip. He had formerly lived at that village for some years, and he and the plaintiff were well acquainted. On the evening of November 13, 1894, the plaintiff, learning that the defendant was at the hotel in the village, called to visit him. As the plaintiff entered the public room of the hotel, he found the defendant seated in front of a washstand on the east side of the room, fixing his gun. He had taken the stock off and the works out, and was fixing the spring, the barrel of the gun lying across his lap. The plaintiff became seated near the defendant, when some conversation was had between them in reference to the gun. During the day the defendant had loaded the gun—that is, had put a number of loaded cartridges into the magazine—but had had trouble with discharging some of them. The gun had twice failed to explode the cartridges during the day, and he took it back to the hotel with the cartridges in the magazine. He testifies that, before he commenced working on the gun to take it apart, he worked the lever which extracts the cartridges from the gun until it failed to throw out any more cartridges, and then took the gun apart, and it was in that condition when the plaintiff [26] came in. The parties differ as to the position of the gun and the position occupied by each after the plaintiff came into the room. The plaintiff testified that, after he had spoken to the defendant, he "asked him about the gun, and what was the matter with it, and defendant said the spring was not stiff enough; that it wouldn't set the cartridges off—meaning the fire. I said, 'Perhaps, if you put a piece of leather under the spring, it will make it so it will stand during the hunting season.' He finally took it apart and put the piece of leather under the spring, and put the spring, with the rest of the works, back into the gun, turned it up like that [indicating], and drew the gun up like that [indicating], and discharged it. The gun was pointed so that when it went off it hit me in the leg." He further testified that the gun was on the defendant's knee, and that he put the works in, and "then it was ready to see if the spring was any stiffer. He just turned it and drew it onto me." On cross-examination, he testified that the gun was not pointed at him until the spring was fixed and defendant brought it up to try it. He was asked:

"Did you say anything about trying it? A. Yes, sir. After he put the leather under the spring, then I told him to try it—see if he could get it any better.

"Q. There was only one way for him to try it? A. He could try it by raising the hammer and not letting it snap down.

"Q. Didn't he do that—raise it with his thumb? A. No; he raised the hammer and snapped it, and drew it onto me. I didn't tell him to draw it onto me. I leaned back in my chair. I saw him do this. In order to get away, I had to get forward. It happened so quick I didn't have time to take a second thought.

. . . .

"Q. When you said to him to try it, of course the only thorough way to try that would be to cock the gun, and let it pull the trigger, and let it strike down? A. But he needn't point it at anybody.

"Q. Did you think the gun was loaded? A. No, sir; I didn't; but I ain't in the habit of pointing [27] a gun at anybody, or having it pointed at me, whether it was loaded or not."

The witness further testified that during all the time he was in the room, and up to the time when the gun was snapped off, he was not in range with the muzzle.

The defendant's statement of the affair is, that he had been in the woods, and had shot at a deer or two that day, and that the gun had failed to go off; that that evening he was trying to tighten the mainspring; that when the plaintiff came in, defendant showed him the cartridge which the gun had refused to break, and had only dented the top of it a little; that after fixing the spring, he was working the hammer, when the plaintiff said, "Snap it off; it won't hurt it"; that he did snap it off, when it went off, and the plaintiff was injured. He testified further that the gun was in the same position from the time he started to work at it until it was discharged; that he believed it was entirely unloaded, and that there was nothing that occurred there that night to indicate that there was anything wrong with the mechanism of the gun; that the lever operated as it usually did when emptying the gun and magazine of the cartridges; that he had no recollection of any change in the plaintiff's position or of his own after the plaintiff sat down there; that the gun pointed in his direction all the time from the time he sat down until it was discharged; that he did not pick it up, raise the hammer and bring it around toward the plaintiff, and then pull it off. The defendant further testified that he supposed he had all the cartridges out of the gun and out of the magazine; that his attention was called to this before the plaintiff came in by a Mr. Callahan, who asked, "Is there anything in that gun?" and defendant told him there

was not, and that he said to him, "Do you suppose I would go to work to fix a gun with any loads or cartridges in it?" that he pumped the lever to show him there was not, probably five or six times; that this was the usual way of throwing out the cartridges. It was shown, however, [28] by the testimony of other witnesses, that if the cartridge was carried from the magazine to the barrel by working the lever after the works had been put back into the gun, the cartridge would come into plain view of the one working the lever.

The defendant presented several requests to charge to the court, relating to the question of defendant's negligence. These the court refused, but charged the jury upon that question as follows: "It seems from some cause—the witnesses are not able to explain just how—one cartridge was not removed, and the result was this accident. The pointing of the gun, under such circumstances, at another, is made an unlawful act by the statutes of this state. The fact that the defendant had used the precautions which he has enumerated, for the purpose of determining whether the gun was or was not loaded, will not relieve him from liability, from the consequences of his negligent act in pointing the gun at the plaintiff, raising the hammer, and pulling the trigger, which were the immediate acts which caused a discharge of the gun and resulted in injury to the plaintiff. A man is not excused from his act in injuring another by pointing and discharging a gun at him from the fact that he supposed he had taken all necessary precautions prior to the doing of this for the purpose of ascertaining and determining that the gun was not loaded. The act of pointing a gun at another, cocking it, and pulling the trigger, is of itself a negligent act; and the person so doing, if the gun chances to be loaded and is discharged, and injures another, is not excused from the consequences of this negligent act on account of the care which he took prior to its commission to determine whether the gun was loaded. I therefore charge you, gentlemen of the jury, that, under the undisputed evidence in this case, the act of the defendant in pointing the gun at the plaintiff, raising the hammer, and pulling the trigger, which caused the gun to be discharged and to injure the plaintiff, was a negligent act on the part of the defendant, and rendered him liable to the plaintiff in this action, and your verdict must be in his favor, unless you find that the plaintiff himself was guilty of contributory negligence. The plaintiff, in order to recover, must establish, by a preponderance of evidence, two facts: 1. That the injury [29] was caused by the negligence of

the defendant; 2. That he himself was not guilty of contributory negligence. And the burden of proof is upon the plaintiff to establish both of these propositions. I have already instructed you that, as a matter of law, the plaintiff has established the first proposition—that the defendant, in so pointing the gun and discharging it, was guilty of negligence."

The sections of the statute referred to by the court in its charge to the jury are 9110-9113, inclusive, of 2 Howell's Statutes. The act was passed in 1869, and is entitled, "An act to prevent the careless use of firearms." In People v. Chappell, 27 Mich. 486, this statute was under consideration, and it was held that a prosecution would not lie, and a conviction would not be sustained, under it, where the use of firearms was not careless, but was intentional or malicious. Mr. Justice Campbell, in speaking of the act, said: "The statute was designed to punish a class of acts done carelessly, but without any design of doing mischief, and the various sections must, under our constitution, be construed so as to conform to the title. The absence of malice is as necessary an ingredient in the statutory definition as the use of firearms. And the offense is purely statutory."

Section 9113 provides: "Any party maimed or wounded by the discharge of any firearm as aforesaid. . . . may have an action on the case against the party offending, for damages, which shall be found by a jury," et cetera.

The general rule, and without reference to this statute, is that a very high degree of care is required from all persons using firearms in the immediate vicinity of others, no matter how lawful or even necessary such use may be: 7 Am. & Eng. Ency. of Law, 523. This same principle is stated in 2 Shearman and Redfield on Negligence, 4th ed., sec. 686. In Morgan v. Cox, 22 Mo. 373, 66 Am. Dec. 623, it was held that, where injury to another is caused by an act that would have amounted to trespass vi et armis under the old system of actions, it is no defense that the act occurred [30] through inadvertence, or without the wrongdoer's intending it; it must appear that the injury done was inevitable, and utterly without fault on the part of the alleged wrongdoer. Defendant's counsel contended that if the jury found that the defendant had used the ordinary and usual means of unloading the gun, and satisfied himself by such means that the gun was unloaded, then he could not be charged with negligence. We think the court very properly refused that instruction. As was said in Castle

v. Duryee, 2 Keyes, 173: "It is not the law that if one, supposing a musket to be unloaded, or to be charged only with powder, snaps it at another, and he is wounded, he is irresponsible in a civil action; and it is of no consequence, so far as maintaining the action is concerned, that he acted upon the most plausible or the most reasonable grounds, and fully believed that the gun was not charged with anything which could injure another."

In Judd v. Ballard, 66 Vt. 668, it appeared that the plaintiff was injured by the discharge of a revolver in the hands of the defendant while the two were facing each other, lying in the bottom of an express wagon. The defendant had discharged one of the barrels for amusement, and was fixing the hammer, preparatory to returning the revolver to his pocket, when the discharge which injured the plaintiff occurred. It was said by the court that, "upon the facts presented, the defendant is clearly answerable for the damages." It was further said: "The shooting of the plaintiff was an accident, but in no sense an unavoidable accident. It would not have occurred but for the defendant's carelessness. The test of liability is not whether the injury was accidentally inflicted, but whether the defendant was free from blame": Citing Vincent v. Stinehour, 7 Vt. 62; 29 Am. Dec. 145; Morris v. Platt, 32 Conn. 75; Bullock v. Babcock, 3 Wend. 391. It was further stated in that case: "The injury was the direct result of a force put in [31] motion by the defendant. The fact that the force was put in motion through negligence does not preclude the plaintiff from maintaining trespass. Neither an intention to injure the plaintiff, nor an intention to do the act which caused the injury, is essential. It is sufficient if the defendant does a positive act from which the plaintiff suffers an immediate injury": Citing 1 Smith's Leading Cases, 560; Leame v. Bray, 3 East, 593; Welch v. Durand, 36 Conn. 182; 4 Am. Rep. 55; Claflin v. Wilcox, 18 Vt. 605; Howard v. Tyler, 46 Vt. 683.

The court, continuing, further said: "It was proper to direct a verdict. There was no room for conflicting views as to the essential feature of the defendant's conduct. The question was not whether it was proper to place the hammer between two cartridges, nor whether the defendant was handling the hammer in a proper manner. However proper it may have been to place the hammer in that position, and whatever the care with which the defendant was moving the hammer, it was negligence to be adjusting it with the revolver so held that an ac-

cidental discharge would injure the plaintiff. There was no evidence tending to show that the position of the revolver at the time of discharge was due to any controlling outside force, and no circumstances are shown from which the presence of such a force could be inferred. Any danger that might arise from the jolting of the wagon the defendant was bound to consider. The undisputed facts admit of no inference which could relieve the defendant from liability."

In Tally v. Ayres, 3 Sneed, 677, it was said: "To constitute an available defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant. The lawfulness of the act from which the injury resulted is no excuse for the negligence, unskillfulness, or reckless incaution of the party. Everyone in the exercise of a lawful right is bound to use such reasonable vigilance and precaution as that no injury may be done to others. Nor is it material, in a civil action for the recovery of damages, whether the injury was willful or not." [32] See, also, Regina v. Salmon, 6 Q. B. Div. 79; 29 Moak, Eng. R. 503.

It is apparent from the defendant's own testimony that he was responsible for the cartridges having been left in the gun. He had been hunting that day, and had loaded it with cartridges. The fact that he believed that he had removed them all from the gun would not relieve him from responsibility in snapping it, when he knew it was pointed directly towards the plaintiff. Had he examined the gun, he would, of necessity, have seen the cartridge there, as it was shown that it would have been in plain view when placing the works back in the gun; also, that when pulling the lever, the cartridge being raised into the barrel, had he then looked he could have seen the cartridge in the barrel. He testified that the gun was pointing at the plaintiff all the time he was fixing it, and that it was in the same direction when he snapped it off. The statute is aimed at just such cases as the present. It was also a plain violation of the statute to snap the gun while it pointed directly toward the plaintiff, and this violation of statutory duty is negligence per se; but, aside from this, we think that under the well-settled rules, and under the authorities above cited, the defendant was guilty of negligence, and was liable in a common-law action.

The only other contention in the case which we deem it necessary to discuss is the claim made by the defendant that the plaintiff was guilty of contributory negligence. That question,

however, we think, was fully and fairly submitted to the jury. The court charged them upon that proposition as follows: "The claim of the plaintiff is, that when he came into the hotel there that evening for the purpose of having a friendly visit with the defendant, he found him engaged in repairing the lock of his gun. He says he took a seat a short distance from him, but out of the range of the gun, as the defendant was then handling it; that after the defendant had repaired the lock and put it together again, that he took this gun up, after some remarks had been made in regard to snapping it or trying [33] it, and shifted its position so that it then was pointing towards him, and snapped the gun. His claim is, that this changing of the gun as he took it up in order to cock it was done so soon that he had no opportunity to protest or get out of the way. If you find that this occurred as claimed by the plaintiff, then he was not guilty of contributory negligence. On the other hand, it is claimed by the defendant that, during all the time the plaintiff remained there, he was sitting either in actual range of this gun, or so near that a slight movement of it would have brought him in range. His claim is, too, that after the lock had been repaired, and while the defendant was operating the hammer to test the strength of the mainspring, that the plaintiff requested him to try or snap the lock while it was pointed (he made this request, rather, at a time when the gun was pointed) right toward the plaintiff in the case; that this request was made twice; that then the defendant did snap the gun, that it proved to be loaded; there was an explosion, and the bullet penetrated the thigh of the plaintiff. If you find that the defendant's version of this is true, I charge you that if you find that during the twenty minutes or so that the plaintiff sat by the defendant before the accident, and while the defendant was repairing the gun, the plaintiff sat in range of the gun, or so nearly within the range of it that a slight movement of it might bring him within range, and if, while sitting there, he knew the defendant was about to snap the gun to try the lock, and had time either to protest or get out of the way, and did neither, or if you find that the plaintiff invited the defendant to try it or snap it, meaning thereby to allow the hammer to strike so as to discharge the cartridge, if one happened to be in the gun, then the plaintiff was guilty of contributory negligence, and he is not entitled to recover. As I have said to you, the burden of proving that he was not guilty of contributory negligence is upon the plaintiff."

There is a claim made in the case that the court improperly

allowed certain expert testimony to be given, bearing upon the question of defendant's negligence in handling the gun; but inasmuch as we hold the court was correct in charging the jury, as matter of law, that the [34] defendant was guilty of negligence, this question is of no importance, and will not be discussed.

The judgment must be affirmed.

The other justices concurred.

NEGLIGENCE—WHAT CONSTITUTES.—Negligence is the failure to exercise such care, prudence, and forethought as duty, under the circumstances, requires should be given and exercised. It is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do: Brotherton v. Manhattan Beach Imp. Co., 48 Neb. 563; 58 Am. St. Rep. 709, and note.

NEGLIGENCE—CONTRIBUTORY—WHEN BARS RECOVERY. One who, knowing the danger from the negligence of another, and understanding and appreciating the risk therefrom, voluntarily exposes himself to it is precluded from recovering for the injury resulting from such exposure: Fitzgerald v. Connecticut etc. Paper Co., 155 Mass. 155; 31 Am. St. Rep. 537; Harris v. Clinton, 64 Mich. 447; 8 Am. St. Rep. 842.

GRASSER & BRAND BREWING COMPANY *v.* ROGERS.

[112 MICHIGAN, 112]

SURETYSHIP—EXTENT OF LIABILITY.—A surety for the purchase price of goods agreed to be purchased in carload lots is not liable for purchases made by his principal in other quantities.

SURETYSHIP—EXTENT OF LIABILITY.—A surety can insist that he cannot be bound except upon his own terms, and his obligation cannot fairly be extended beyond the scope of his written agreement.

SURETYSHIP—APPLICATION OF PAYMENTS.—If a surety under his contract is liable for the purchase price of such goods only as are sent in carload lots, and remittances sent by the purchaser, without direction as to their application, are more than sufficient to pay for such goods as were sent in carload lots and shipped prior to other lots not paid for, the remittances must be applied in payment of the carload lots, and the surety is relieved from liability.

S. Kohn and C. S. Northup, for the appellant.

C. W. Perry, for the appellees.

[112] MOORE, J. March 20, 1890, the plaintiff made a contract with defendant Rogers to sell him "all the lager beer he may need, in carlots, at five dollars per barrel, delivered on board the cars at the city of Toledo, at the rate and price of five dollars per barrel." Rogers, on his part, agreed to use his best en-

deavors to market the beer, "and that he will pay for the beer so delivered, in carlots, by remittance or honoring and paying drafts drawn on him therefor, in such manner that he shall not be [113] indebted to said Grasser & Brand Brewing Company at any one time for more than the price of one lot or shipment; that is to say, that upon making any order for beer, he will remit or honor and pay the sight draft drawn on him to the full amount of all indebtedness then existing." Defendant Doherty became surety for the performance of the contract on the part of Rogers, limiting the amount for which he would be liable to one thousand dollars. Two days after this contract was made, one carload of beer, consisting of two hundred and fifty quarter-barrels, was shipped to Rogers. This was the only carload lot shipped. Other beer was shipped to Rogers in smaller quantities than carload lots, as ordered by him. The value of all the beer shipped him was nine hundred and ten dollars and fifty cents. He made remittances, which were credited upon his account, amounting to five hundred and seventeen dollars and fourteen cents, leaving a balance due to plaintiff from Rogers of three hundred and ninety-three dollars and thirty-six cents, for which amount this suit was brought. It was shown that, if beer was shipped in smaller quantities than carload lots, the freight was proportionately much higher. Defendant Doherty claimed that he was liable only for the beer sold in carload lots, and that, as the remittances would more than pay for the carload that was shipped, he was not liable. The judge sustained the defendant in both positions. Plaintiff appeals.

There are but two questions involved: 1. Was Doherty liable for any of the beer except that which was sold in carload lots? He had a right to choose the terms of agreement into which he entered. His agreement was in relation to sales which were made in and to be paid for in carload lots, and in no other quantities. A surety can insist that he will not be bound except upon his own terms, and his obligation cannot fairly be extended beyond the scope of his written agreement, as, under the statute of frauds, his agreement must be in writing: Johnston v. Kimball Tp., 39 Mich. 187; 33 Am. Rep. 372; Bullock v. Taylor, 39 [114] Mich. 137; 33 Am. Rep. 356; Locke v. McVean; 33 Mich. 473; Michie v. Ellair, 60 Mich. 73; Ferguson v. Davis, 65 Mich. 677; Fay v. Jenks, 93 Mich. 130.

The other question is: Did the court err with reference to the application of payments? The contract provided that payment should be made for one lot of beer before another was

sent. Payments were in fact made more than sufficient to pay for the carload which was sent. The carload of beer was the first beer sent. In Chapman v. Commonwealth, 25 Gratt. 721, the rule is stated as follows: "A payment by a debtor who owes several debts to a creditor is to be applied to one or the other of the debts, as follows: 1. The debtor may direct the application at or before the time of making such payment; and such direction may be given expressly or by implication; 2. If the debtor gives no such direction, then the creditor may make the application according to his pleasure, and he may make it either at the time of such payment, or afterward, before the commencement of any controversy on the subject; but, the application being once made, it cannot be changed without the consent of all the parties; 3. Such application by a creditor may also be made either expressly or by implication. If he enters the debits and credits in a general account, as they occur, this will be considered, in the absence of evidence to the contrary, as a general application of the credits to the debits in the order of time in which the debits occur, thus paying first the debt first due; 4. If neither the debtor nor the creditor makes the application, then the law will make it according to the circumstances of each particular case; and, if there be no other controlling circumstance, the application will be made according to the order of time, paying first the oldest debt."

We do not think the court erred in his disposition of the case. Judgment is affirmed.

The other justices concurred.

SURETYSHIP—CONSTRUCTION OF CONTRACT.—Sureties are not bound beyond the strict terms of their engagement, and their liability cannot be extended by implication: Salem v. McClintock, 16 Ind. App. 656; 59 Am. St. Rep. 330, and note; First Nat. Bank v. Gerke, 68 Md. 449; 6 Am. St. Rep. 453, and note. The same construction is placed upon a contract of guaranty. If a contract of guaranty, for goods to be sold to a third party, is made with a corporation which afterward changes its name and supplies goods after such change, there can be no recovery against the guarantor for goods so supplied: Crane Co. v. Specht, 39 Neb. 123; 42 Am. St. Rep. 562. See Page v. Krekey, 137 N. Y. 307; 33 Am. St. Rep. 731.

PEOPLE v. SMITH.

[112 MICHIGAN, 192.]

FORGERY—INSTRUMENT NOT SUBJECT OF.—A written instrument purporting upon its face to give authority to the bearer to solicit and receive donations for a fund ostensibly under the control and charge of a certain organization, is not a "letter of attorney," or an "order for money," within the meaning of a statute making such instruments the subject of forgery.

F. R. Gartner and E. A. Stricker, for the appellants.

A. H. Frazer, prosecuting attorney, for the people.

192 HOOKER, J. The defendants were convicted of the offense of forgery, upon an information stating the offense as follows, viz.: "Feloniously did utter and publish as true a certain false, forged, and counterfeited letter of attorney, which said false, forged, and counterfeited letter of attorney is as follows:

"Union Iron & Steel Workers: This is to certify that the bearers are members in good standing, and are authorized to solicit 193 subscriptions for our relief fund. All donations thankfully received.

Committee: CHAS. W. HARPER,
H. C. GUTHRIE,
WILLIAM SLOAN.
Secretary: JAS. W. O'BRIEN.

Pingree & Smith,	Pd.	$5 00
George W. Wilson,		3 00
Meyer Binswangaub,	Pd.	3 00
Mabley & Company,	Pd.	5 00

with intent then and there to injure and defraud, they, the said John Smith and William French, at the time they so uttered and published the said false, forged, and counterfeited letter of attorney as aforesaid, then and there well knowing the same to be false, forged, and counterfeited."

The theory of the prosecution appears to have been that there was no such organization as the "Union Iron & Steel Workers," and we think there was testimony from which the jury might properly so find. The principal questions in the case are: 1. Whether this instrument was within the list mentioned in the statute; 2. If so, whether the fact that it was called a "letter of attorney" in the information was fatal, if it was not legally a letter of attorney; 3. Whether it was of any apparent legal effect, and so capable of being forged.

This instrument, upon its face, purports to give authority to the defendants to solicit and receive donations for a fund ostensibly under the control and charge of an organization. If this can properly be called a "letter of attorney," or an "order for money," it is within the statute. If not, the offense which the prosecutor sought to prove was more in the nature of obtaining money by false tokens and pretenses. We think it cannot be called a "letter of attorney" or an "order for money." A letter or power of attorney is commonly understood to be a formal document authorizing some act which shall have a binding [194] effect upon the person making such power of attorney. It is usually under seal, and, while (under our statute) the want of a seal might not invalidate all powers of attorney, it would not follow that every paper conferring authority upon another is a letter of attorney. So, too, an order for money has a well-understood meaning, and it would hardly include the case of one who requests or directs another to solicit and receive subscriptions. Usually such an order contains a request or direction to a third party, who is indebted to the maker of the order, to pay such money to the person named. We are of the opinion that under 1 Howell's Statutes, section 2, it should be held that this writing was not included in the list enumerated in the statute.

The judgment of the recorder's court is reversed, and the prisoners discharged.

The other justices concurred.

FORGERY—INSTRUMENTS WHICH MAY BE SUBJECT TO.—An instrument which is void, or without legal efficacy on the face of it, or which is not shown, by proper averments of extrinsic facts, to be capable of affecting the rights of another, cannot be the subject of forgery: See monographic note to Arnold v. Cost, 22 Am. Dec. 315, discussing instruments which may and those which may not be the subject of forgery: Monographic note to Hendricks v. State, 8 Am. St. Rep. 466-470; Caffey v. State, 36 Tex. Crim. Rep. 198; 61 Am. St. Rep. 841, and note.

CAMPBELL *v.* REMALY.

[112 MICHIGAN, 214.]

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES BETWEEN.—Although a deed to an undivided interest in land executed by a husband to his wife in consideration of the discharge of her mortgage covering the whole tract is withheld from record for several years, and he obtains credit in the meantime by representing himself as the owner of the whole tract, this is not sufficient to subject the land granted to the claims of intervening creditors of the husband, in the absence of proof that the wife participated in or had any knowledge of the fraud.

Spaulding & Norton, for the complainants.

J. C. Flynn and Lyon & Dooling, for the defendants.

[214] MONTGOMERY, J. Complainants are bankers, and, in 1894, extended credit to defendants Frank and Albert Remaly, and, on the thirtieth of December, 1895, obtained a [215] judgment upon their demand, amounting to seven hundred and sixty-five dollars and seventy-six cents. Prior to the twenty-ninth of June, 1895, the defendant Frank Remaly appeared by the record to be the owner of one hundred and twenty acres of land in Clinton county. On that date there was placed of record a deed of an undivided one-half of these premises, running to his wife, Nina Remaly, which deed bore date April 12, 1888. Subsequently, on the first of July, 1895, there was placed of record a mortgage from Frank Remaly to his wife, on the remaining undivided one-half of said premises, for the sum of one thousand dollars. After procuring a levy under an execution issued upon their judgment, complainants filed this bill, seeking to have both the deed and mortgage set aside as fraudulent, and made with a purpose to hinder, delay, and defraud creditors, and charging that there was no consideration for either the deed or the mortgage. At the hearing the court granted partial relief by setting aside the deed, but upheld the mortgage. From this decree the defendants appeal.

Complainants' counsel very properly state that, as no appeal was taken by complainants, the transaction of the giving of the mortgage can only be considered as it gives color to the transaction relating to the deed. The testimony is neither voluminous nor involved. The complainants offered testimony tending to show that, at the time of extending credit to Remaly Brothers, the defendant Frank Remaly represented that he was the owner of the land in question. This, in addition to the fact that the deed was kept from record from 1888 to 1895, constitutes substantially the only testimony tending to indicate any fraudulent purpose on the part of defendants. The evidence establishes very clearly that, when this land was originally purchased by the defendant Frank Remaly, a mortgage was given to one Mr. Darrow, the father of the defendant Nina, which mortgage was assigned to her by her father in May, 1886, and which assignment was duly recorded in November, 1886. Nor can there be any doubt that the deed of the undivided [216] one-half was made in consideration of the discharge of this mortgage, on the 12th of April, 1888. It does not appear that at this

time Frank Remaly was engaged in any business which required credit. It cannot, therefore, be inferred that the deed was originally withheld from record with the fraudulent purpose of enabling the grantor to maintain a false credit. Nor are we able to find in the record any evidence which convinces us that there was any subsequent agreement or common purpose to withhold this deed from record with that intent. Indeed, the only fact from which it could be inferred consists of the continued withholding of the deed from record, and the false claims of ownership made by Frank Remaly. But these false claims are in no way brought home to the defendant Nina, and are not binding upon her. As we have frequently pointed out, the recording law does not render an unrecorded deed void as to intervening creditors who have not acquired a lien while the deed remained off the record. In this respect the statute differs from the chattel-mortgage statute: 2 Howell's Statutes, sec. 6193. See Wooden v. Wooden, 72 Mich. 353; Cutler v. Steele, 93 Mich. 204; Michigan Trust Co. v. Adams, 109 Mich. 181. We by no means intimate that, where there are other facts and circumstances tending to show that the purpose of withholding the deed was specifically that of giving a false credit to the grantor, this may not amount to a fraud which will postpone the grant to the claims of intervening creditors. We think this record does not justify any such inference as to the facts in this case. It follows that the decree will be reversed, and the bill dismissed, with costs of both courts to the defendant Nina Remaly.

The other justices concurred.

FRAUDULENT CONVEYANCES FROM HUSBAND TO WIFE —WHAT ARE NOT.—A voluntary conveyance of his whole estate by a husband not indebted at the time, to trustees for his wife's benefit, duly recorded, is valid if not made with a view to future debts: Martin v. Oliver, 9 Humph. 561; 49 Am. Dec. 717, and note. Where a husband, indebted to his wife for advances made by her to enable him to build upon lots owned by him, in fulfillment of a prior promise makes to her a deed of the property just before a judgment is entered against him by another creditor, standing upon an equal footing with her, for a debt incurred by him before he acquired title to the lots, the wife receiving the deed without any design to defraud others by the form of the conveyance, such deed will not be avoided at the suit of such creditor: Brock v. Hudson County Nat. Bank, 48 N. J. Eq. 615; 27 Am. St. Rep. 451, and note. See Williams v. Harris, 4 S. Dak. 22; 46 Am. St. Rep. 753, and note; Second Nat. Bank v. Merrill, 81 Wis. 151; 29 Am. St. Rep. 877, and note; note to Steele v. Coon, 20 Am. St. Rep. 715.

GRAND RAPIDS *v.* WILLIAMS.

[112 MICHIGAN, 247.]

DISORDERLY CONDUCT—INTENT.—An improper or unlawful purpose is not a necessary element in the offense of indecent, insulting, or immoral conduct, in violation of an ordinance providing a punishment for such conduct.

CRIMINAL LAW—ALLEGATION OF PLACE.—An allegation in a complaint that the offense charged was committed "at a house on the corner" of two specified streets within a certain city is a sufficient allegation as to place of the offense.

DISORDERLY CONDUCT—WHAT IS.—A stranger who has no business there and is peeking into the windows of an occupied, lighted residence, at hours of the night when people usually retire, is guilty of indecent and insulting conduct, and violates an ordinance providing a punishment for disorderly, indecent, or insulting conduct or disorderly persons.

DISORDERLY CONDUCT—EVIDENCE—IDENTIFICATION.—Evidence of an attempt by persons to take hold of and detain one whom they have seen shortly before peeping into a window is admissible for the purpose of identifying him on his trial for such disorderly conduct.

B. Hoyt, for the appellant.

H. J. Felker and H. Joslin, for the appellee.

247 MOORE, J. The respondent was convicted of a violation of section 1 of an ordinance of the city of Grand 248 Rapids, entitled, "An ordinance relative to disorderly persons," which reads: "All persons who shall be engaged in any illegal or improper diversion, or shall use any indecent, insulting, or immoral language, or shall be guilty of any indecent, insulting, or immoral conduct or behavior, in any public street or elsewhere in said city, ... shall be deemed to be disorderly persons, and, upon conviction thereof, shall be punished," et cetera.

The complaint, omitting the parts purely formal, reads as follows: "On the eighth day of September, 1895, at the city of Grand Rapids aforesaid, and within the corporate limits of said city, one George Williams was then and there guilty of indecent, insulting, and immoral conduct and behavior, by peeking in the windows of a house on the corner of Wenham avenue and Lagrave street, said house being then and there occupied by persons living therein, and not being the residence of said Williams, and was then and there found in a state of intoxication, to the evil example of all others in like case offending, contrary to the provisions of section 1 of an ordinance of said city, entitled, 'An ordinance relative to disorderly persons.'"

Objection was made to the admission of any testimony, because the complaint does not state an offense: 1. Because looking into a house where persons reside is not immoral, insulting, or indecent; 2. Because no improper or unlawful purpose is alleged; 3. Because the complaint does not set forth any circumstances from which it would appear that the alleged act was immoral, insulting, or indecent; 4. Because it does not allege that any person was in the house; and 5. Because the complaint does not describe the place of the alleged offense.

The testimony disclosed that in the night, between half past 10 and 12 o'clock, respondent was seen to leave the sidewalk, and go to the bay window of a residence, about six feet from the walk; and, when within about six inches of the window, he leaned over, with his arm on [249] the window sill, and putting his right hand above his eyes, looked into the window, and remained in that position about two minutes. The room was lighted. The window shade was six to twelve inches above the window sill. The room was occupied by several persons, some of whom were women, and all were dressed decorously. The respondent did not live at the residence where this occurred, and, so far as the record discloses, he had no business to call him there. Two witnesses, who saw the respondent while at the window, were allowed, over the objection of the respondent, to testify that half or three-quarters of an hour later they attempted to take hold of the accused and detain him, when he jerked away from them, and jumped over a high board fence, and escaped.

After the testimony was closed, the respondent asked the judge to direct a verdict in his favor. This request was refused, and, after calling the attention of the jury to the provisions of the ordinance and the contents of the complaint, the court charged them: "It is no offense for a person walking along on the sidewalk, and without trespassing upon the premises of another, to look through an uncurtained window, or a window partially covered with a curtain. But if a person steps off the sidewalk, not at the usual approaches or walks to a house, and for no legitimate purpose, and without the consent and against the will of the owner, in such case he may be a trespasser and wrongdoer; and if, after so trespassing, he proceeds to a window with a curtain raised from five to twelve inches, and leans upon the window sill, and with no legitimate purpose in so doing, such peeking in at such window so shaded by curtains at 11 or 12 o'clock at night may, in law, be said to be peeking into the window, although he is

not looking through a small crack; and in this case I will leave it to you to say whether the respondent was peeking into such window or not." Other features of the case were discussed, and the jury returned a verdict of guilty.

The second objection to the complaint is decided against the position of the respondent by the case of Grand Rapids v. Bateman, 93 Mich. 135.

250 The objection that the complaint does not sufficiently designate the place of the alleged offense is not well taken: Quinn v. State, 65 Miss. 479.

The question involved is, Did the complaint state an offense punishable by the ordinance? We cannot conceive of any conduct much more indecent and insulting than for a stranger to be peeking into the windows of an occupied, lighted residence, and especially at the hours of night when people usually retire. The judge was not in error in holding that the complaint stated an offense.

The testimony admitted as to what occurred between the respondent and the parties who were watching him was entirely competent for the purpose of identifying him.

The verdict of the jury was justified by the evidence.

Judgment is affirmed.

The other justices concurred.

CRIMINAL LAW—EAVESDROPPING 's an indictable common-law offense, and consists in the nuisance of listening under walls or windows or the eaves of houses to hearken after discourse and thereupon to frame slanderous and mischievous tales: State v. Pennington, 3 Head, 299; 75 Am. Dec. 771. The offense, it seems, consists in listening, and not in peeping or looking privily, the latter being held not to be indictable: Note to State v. Pennington, 75 Am. Dec. 773.

INFORMATION—PLACE OF OFFENSE.—A local offense must be described as committed in a particular town: State v. Nixon, 18 Vt. 70; 46 Am. Dec. 135.

TRYON v. PINGREE.

[112 MICHIGAN, 338.]

CONSPIRACY — OBSTRUCTING PUBLIC OFFICER.— A combination of two or more persons to obstruct an executive officer in the exercise of his lawful right to examine, in his official capacity, the books of a city officer for a proper purpose, is indictable as a conspiracy.

FALSE IMPRISONMENT—WARRANT REGULAR ON ITS FACE.—If a person is imprisoned by virtue of a warrant issued by a court having jurisdiction of the subject matter and regular on its face, an action for false imprisonment cannot be maintained.

OFFICERS—OFFICIAL DUTY—CONSPIRACY.—Although it is within the province of the mayor of a city, in his official capacity, to investigate the books of other officers of the city and give public information in relation thereto if he thinks best, it is no part of his official duty to aid individuals in obtaining an examination of such books, and a combination of persons to prevent him from rendering such aid is not a criminal conspiracy.

MALICIOUS PROSECUTION—EVIDENCE.—In an action for malicious prosecution based upon an action by an executive officer for an alleged conspiracy to obstruct him in the exercise of his right to examine, in his official capacity, the books of another whether he was acting in the exercise of his lawful right to examine, in his official capacity, or in his private capacity in attempting to make such examination, is a material inquiry, and evidence that he was merely seeking to aid an individual in obtaining access to the records, and an examination of such books, is relevant and admissible.

MALICIOUS PROSECUTION—PROBABLE CAUSE.—If, in an action for malicious prosecution, it is shown that the defendant, before the commencement of the prosecution, made a full and fair statement of the facts to counsel and was advised that they constituted a criminal offense, and, believing and relying upon such advice, commenced the criminal proceeding, he is not guilty of malicious prosecution.

TRIAL—INSTRUCTIONS.—The refusal of the court to give requested instructions correctly stating the law upon an immaterial issue, is error, if other instructions are given on such issue which may mislead the jury.

G. Gartner, F. C. Harvey, and F. A. Baker, for the appellant.

T. T. Leete, Jr., E. R. Sutton, and C. A. Kent, for the appellee.

339 MOORE, J. This is an action for malicious prosecution and false imprisonment. Verdict and judgment were given for defendant, and plaintiff brings the case into this court.

In August, 1894, the plaintiff was secretary of the board of fire commissioners of the city of Detroit, and had the custody of its books and papers. The defendant at this time was mayor of the city of Detroit. The act creating the board of fire commissioners provided: "The books and accounts kept by said board shall at all times be subject to the inspection of the mayor and controller." Mr. Greusel was employed by the "Detroit Tribune," a leading paper of Detroit, to look up and prepare matter for publication pertaining to the fire department. An article was published which the commissioners claimed untruly reflected upon the management of the department, and they directed the secretary not to permit Mr. Greusel to examine any more of the books belonging to the department. Upon the refusal of Mr. Tryon to permit an examination of the books by Mr. Greusel, the managing editor of the "Tribune" wrote a letter to the mayor, stating the refusal by Mr. Tryon to allow Mr.

Greusel to examine the books, and saying that they had information which led them to believe that serious irregularities existed in the management of the fire department, and asked the mayor to request Controller Moore to make an examination of the books in the presence of Mr. Greusel. It was also claimed by the mayor that he had received information of irregularities from other sources.

The mayor and controller visited the office of the fire department, and found the assistant secretary in charge. He was informed by the mayor that he had come, as mayor, to examine the books. A few books and papers were examined, but those in the safe were not produced for his inspection. The next day the [340] mayor, accompanied by Mr. Greusel, visited the office, and found the plaintiff in charge. The mayor requested that Mr. Greusel be allowed to examine the books as his representative. This was refused. He then demanded to see the books himself, and was told that he could not do so until Mr. Goodfellow, president of the commission, was notified. Later in the day, Mr. Pingree, accompanied by his secretary, two policemen, and Mr. Greusel, again visited the office. Mr. Tryon was not there. The books were not produced for examination, and, after a delay of an hour, the mayor and his secretary left the office. Mr. Greusel remained, with written authority from the mayor to examine the books in his behalf.

After leaving the office, Mr. Pingree met Mr. Tryon and Mr. Goodfellow on their way to the fire department. Some conversation ensued. The mayor stated that he had left Mr. Greusel to examine the books. He was informed by Mr. Goodfellow that the commission was in charge of that office, and that he would go down and throw Greusel out; and the defendant stated he would go along and see him thrown out. A whispered conversation occurred between Mr. Tryon and Mr. Goodfellow, and Mr. Tryon went on ahead of the others. When Mr. Pingree and Mr. Goodfellow reached the offices, they were closed, and the doors locked. A controversy arose. A number of firemen were called by Mr. Goodfellow to eject Mr. Greusel. Mr. Pingree attempted to protect him. Then Mr. Elliott and others seized and held Mr. Pingree, and Mr. Greusel was thrown downstairs. Mr. Pingree remained for a time, and demanded to see the books. His demand was refused. About 6 o'clock of the same day, Mr. Pingree, with his secretary, Mr. McLeod, and several policemen, again visited the offices of the fire department, and demanded to see the books. His demand was refused, upon

the ground that it was after office hours. On the evening of the same day, Mr. Pingree summoned to his office Mr. Flowers, a lawyer, Police Justice Sellers, John G. Hawley, a lawyer, and others. [341] It is claimed by the defendant that he fully and fairly stated all of the facts of which he was advised to Mr. Hawley, his lawyer, and that he was advised by Mr. Hawley that the plaintiff and Mr. Goodfellow, Mr. Elliott, and other persons were guilty of a conspiracy. Mr. Hawley dictated a complaint charging conspiracy, in the presence of both of the police justices. The complaint was sworn to by Mr. Pingree. Police Justice Sellers issued a warrant. It is claimed that this ended his connection with the criminal case. On the part of the plaintiff, it is claimed that, at the examination, he was represented by private counsel, and that he instigated the arrest and the subsequent prosecution of the case. Mr. Tyron was arrested, gave bail, and at the examination, after the witnesses were sworn, upon advice of the prosecuting attorney, was discharged. He then brought this suit, with the result already stated.

A good many questions are raised by the record and briefs. It is admitted that the mayor had the right to examine the books in his official capacity; but it is claimed by the plaintiff that, in all he did, he was not acting as mayor, but was seeking to help Mr. Greusel personally, and was actuated by improper motives. It is also claimed by the plaintiff that the mayor could not delegate his right to examine the books to Mr. Greusel. It is urged that Mr. Pingree did not fully and fairly state all the facts he knew to Mr. Hawley. It is contended that to obstruct an executive officer is not a crime, either at common law or by statute, and that the complaint which was made did not charge an offense. A large number of assignments of error were taken. These have all had careful consideration; but it will not be necessary, in our view of the case, to discuss all of them.

The charge of the trial judge, so far as it is necessary to quote it, was as follows: "I give you defendant's sixth request, as modified: 'That the warrant having been issued by a court having jurisdiction of the preliminary examination of all offenders [342] or offenses committed in Detroit, the judgment of the court that there is such a crime as the one charged, and that there was reason to think the persons charged had committed it, protects all persons concerned in the issue or execution of the warrant, as far as false imprisonment is concerned.' I charge you that it is the law of this case that there can be no recovery as against the defendant on the count in this declaration for false impris-

onment. I understand it to be the law as laid down in Wheaton v. Beecher, 49 Mich. 348, that, when the offense stated in the warrant is such an offense that the justice has jurisdiction of the subject matter, the warrant will protect the officer serving it, and also all parties making the complaint. I charge you that in this case the justice did have jurisdiction of the subject matter for which this warrant was issued, and that, having jurisdiction of the subject matter, there can be no recovery in this case upon any ground of false imprisonment. The question that I shall leave to you is simply one question for you to determine, or two questions, rather, and that is upon the count in this declaration charging the defendant with malicious prosecution. Indeed, in order to sustain an action for malicious prosecution, it is necessary that two things should be proven: 1. That there should be malice—and, in case of malicious prosecution, I understand malice to be an intentional wrongdoing. This malice may be inferred from want of probable cause; that is, if there was no probable cause for the issuing of the warrant, then a jury may infer from that a malice such as is required by law. But, gentlemen of the jury, want of probable cause is to be inferred or to be proven or established before you in this case on these premises. I charge you that if the defendant in this case, Mr. Pingree, fully, fairly, and honestly stated the facts as they appeared to him, and as he knew them, to John G. Hawley, or to the police magistrate, and that, upon such a statement, this warrant was issued, then there can be no recovery in this case for malicious prosecution, even if the advice of John G. Hawley was wrong, or the warrant was issued without authority of law, or the warrant did not state any offense against the law. The principle which governs in this case is laid down by the supreme court of the state, and is as follows: 'Every man of common information is presumed to know that it is not safe in matters of importance to trust to the legal opinion of any [343] but recognized lawyers. When a person resorts to the best means in his power for information, it will be such proof of honesty as would disprove malice, and operate as a defense proportionate to his diligence.' And in Perry v. Sulier, 92 Mich. 75, it is said that 'the person seeking and receiving such advice is, in law and in morals, justified in acting upon it, provided that he fully and fairly states the facts to the attorney.' Now, that is the question for you to decide, and the sole question involved in this case for your determination. And this language also has been used by the supreme court, which covers the law in this case which I think it necessary

to submit to your consideration, and the rule fully stated, that, if a prosecutor has fairly submitted to his counsel all the facts that he knows, capable of proof, and he has acted bona fide on the advice given, he negatives the want of probable cause, and is not liable in an action of malicious prosecution. If you shall find that the statement made by Mayor Pingree or Mr. Pingree, of the facts as they were shown to him, and as he knew them, and of all the facts, was fairly stated to John G. Hawley, and the warrant obtained after that statement, then the defendant in this case is not liable for any damages; but if you shall find the facts were not fairly stated, that he was actuated by malice, that he did not conduct himself in a bona fide way, or did not come up to any of the principles laid down in the law as I have stated it to you, then the plaintiff would be entitled to recover such damages as you shall see fit to give him under the rule that I have already laid down in giving the requests of the plaintiff on the subject of damages, which is needless for me here to repeat."

We must assume that the provision of the charter of Detroit (chapter 16, section 24), authorizing the mayor to examine the books of the fire commissioners at all times, was designed to promote the public interest, by securing honesty and accuracy in the management of the affairs of the department under the control of the fire commissioners. Any obstacle that should be unlawfully interposed to prevent such an examination for a proper purpose would be an obstruction of the functions of government, and indictable as such at the common law. It is said that the offense of obstruction of officers is confined to court officers, bailiffs, et cetera, and does not extend to officers who [844] have to do with executive duties, as contradistinguished from those having judicial functions, and those who are charged with the enforcement of judicial mandates, conservators of the peace, et cetera, and that no case can be found where one has been convicted for such an offense. This does not necessarily imply that acts constituting an obstruction of government are not indictable at common law, and we should be reluctant to hold that acts of trespass, not otherwise criminal, would not become criminal if the object and effect were to prevent the governor, or legislators, or other state officers from performing the duties pertaining to their respective departments. We cannot think that the mother country, which punishes seditious libels and slanders, would have tolerated acts which actually interrupted official action; and it is possible that the English law would justify the conclusion that

such an act would be punishable as a contempt against the king's prerogative by fine and imprisonment, at the discretion of the king's court of justice: 4 Blackstone's Commentaries, 122. Mr. Bishop, in dealing with the question, has no apparent hesitancy in saying that the obstruction of governmental functions is criminal, where the act is of sufficient magnitude to deserve notice: 1 Bishop's New Criminal Law, sec. 457. He says (section 480) that "of natures akin to treason, yet of inferior rank, are the various obstructions of the governmental machinery. The leading ones have been particularized in this chapter, but all other obstructions of the like sort and magnitude are also common law offenses." It is fair to say that he adds: "Practically, the law of this chapter is greatly circumscribed by the rule that it does not notice small things." Just where the line is which marks the limit of crime, and separates it from the realm of "small things which the law does not punish," is hard to say; but we are impressed with the gravity of an act which prevents executive officers of the nation, state, or cities from performing the duties of their offices.

If it be a fact that it was suspected that irregularities [345] existed in the management and use of the funds of the fire department of Detroit, the public was interested in knowing the truth, and had the right, through its mayor, to ascertain it; and, if interested parties were able to prevent it, with impunity, there would be no means of protecting the government in its rights except the slow process and uncertain efficiency of civil proceedings. Whether the charge was well or ill founded is another question. The warrant was sufficient to charge a most flagrant case, and being, in our opinion, good upon its face, the plaintiff's remedy then, if he had been wronged, was confined to an action for malicious arrest or prosecution, and the trial court did not err in directing a verdict for the defendant upon the count for false imprisonment.

While we are convinced that obstruction of the performance of an official duty is an offense at common law, we understand that the inquiry may always be made in a court of justice whether the obstruction is of an official or a private act. If the latter, it cannot be said that it is an obstruction of, or interference with, governmental functions. Hence evidence tending to show the defendant's object should not have been excluded: 2 Bishop's New Criminal Law, sec. 1010, and cases cited.

It was claimed in this case that the circumstances showed that Mr. Greusel, a reporter of a daily paper, desired an opportunity

to examine the books, for the purpose of making public such facts pertaining to the department as might be thought of interest to the public; that, being refused the opportunity, he invoked the aid of the defendant, who was willing to aid him, by means of his official privileges; and that it was for this purpose only, and not for any purpose connected with his office, that he made the demand; and that this question should have been submitted to the jury. It was no part of the official duty of Mr. Pingree to aid individuals in obtaining their rights, if they had any, as to the examination of books. It was within his province to investigate those books, and give the public information concerning the [346] condition of affairs, if he thought best. We have no right to determine this question unless we can say that the undisputed evidence shows one thing or the other; and as, in our opinion, it does not, it was for the jury to determine, from all of the circumstances shown.

Counsel for the plaintiff requested the court to charge the jury that: "If, therefore, the defendant demanded the right to inspect otherwise than in his official capacity and for official purposes, then any refusal on the part of the commission or its agents would not constitute the offense of obstructing, hindering, and preventing a public official in the discharge of his duty."

And again: "If the defendant, in going to the office of the fire commission, did not go in good faith and for official purposes solely, but for the purpose of helping out Greusel and aid the 'Tribune' in getting up a story, then you are instructed that there was no probable cause in instituting the prosecution, and the advice of counsel is no defense to his action. In determining the question of malice, the jury are at liberty to infer malice from the want of probable cause, and they may also take into consideration what the real purpose of defendant was in going to the office of the fire commission, whether for official or for other purposes."

And again: "The defendant had no right to use his official power to secure an investigation of the books and records of the fire commission by Greusel for the 'Detroit Tribune,' that newspaper and Greusel having a right to seek such remedies in the courts as they were in law entitled to."

And again: "The defendant had no right to delegate his power as mayor to investigate the books and records of the fire commission to Greusel, or to any other private party."

These requests show clearly enough the claim that was made on behalf of the plaintiff, and he was entitled to have it pre-

sented, unless the case was submitted in such [347] a way as to make it unnecessary. But it was not presented, and, instead, the court said: "I charge you also that it is the law of this case that the mayor had the right to examine the books of the fire commission; that this right is conferred upon him by the charter of this city; and it is contended that Mr. Greusel, taken down there by the mayor, under the circumstances related by these witnesses, was not included in this privilege, or this permission, or this right which is conferred upon the mayor by the charter of this city. I was of that opinion when the law of this case was argued to me by counsel, but since then a decision of the supreme court has been called to my attention, which changes my opinion on this question; and, on the authority of Burton v. Tuite, 78 Mich. 363, I charge you that it is the law of this case that Mayor Pingree had the right to take down with him, for the purpose of conducting the examination of the books of the fire commission, Mr. Greusel, or any other person that suited his convenience to conduct this examination. I think, under the authority of that decision, this record is a public record, entitled and open to inspection, and that, under the facts in this case, the mayor of this city was justified in taking some person that he saw fit for the purpose of making an examination of the records of this office."

It having been shown that the defendant caused the criminal action to be commenced, and that it was terminated by the discharge of the defendant therein (the plaintiff here), it became material to inquire whether the commencement of the prosecution was malicious or not. And if it was shown that the defendant made a full, fair statement of the facts in the case to counsel, and was advised that they constituted an offense, and believing and relying upon such advice, and in the guilt of the plaintiff, commenced the proceeding, the defendant cannot be said to have maliciously prosecuted the plaintiff. If, as counsel for the defendant contend, it was proper for the case to go to the jury upon these two questions alone (which questions the charge shows were submitted to the jury), there was no necessity to give the requests above quoted, because the advice of counsel and defendant's good [348] faith would be a complete defense, whether the advice were good or not, and defendant could not be found guilty, although he should be mistaken and misinformed as to his right to aid Greusel in his endeavor to see the books, and it became unnecessary for the jury to inquire whether Greusel had the right to see these books for his own purposes,

or to trouble themselves with the question whether Mr. Pingree was there officially or not, because, as already stated, the advice of counsel and good faith of defendant were an ample shield, and conclusive of the case. But the judge did not stop with his instructions upon these questions. He proceeded to discuss the rights of Greusel and the authority of the mayor in a way that would naturally lead the jury to infer that the defendant did not transcend the bounds of his authority, and, consequently, that the defendant did not need the advice of counsel to justify his complaint, and that they might find probable cause from those facts, and acquit the defendant, although not satisfied that he had made a full and complete statement to counsel, or acted upon such advice. In doing this, the court refused to instruct the jury in accordance with the requests, some of which were correct statements of the law, and important to be laid before the jury if they were going into the question mentioned, even if the plaintiff had not a right to have that question presented, and which it is evident that plaintiff's counsel sought to have presented. The situation would not be improved by saying that the court did not submit the case upon the two questions alone, and that the question raised by the plaintiff's requests was left to the jury. In either case, the court permitted the jury to infer that, if the defendant went there solely to aid Greusel in securing his alleged rights, it was an official act, and they would be likely to understand: 1. That the mere refusal to permit an inspection of the books would amount to a justification for issuing the warrant, without regard to the other elements essential to a criminal conspiracy; 2. That if the purpose of the defendant was merely to enable [349] Greusel to obtain access to the books for his personal purposes, the refusal constituted an offense.

The judgment of the circuit court is reversed, and a new trial ordered.

The other justices concurred.

CONSPIRACY—CRIMINAL—OBSTRUCTION OF OFFICER.—All conspiracies to pervert, obstruct, or defeat the course of public justice in a criminal or civil proceeding are indictable; as where it is accomplished by suppression or fabrication of evidence, or by impeding an officer in the discharge of his official duty: See monographic note to People v. Richards, 51 Am. Dec. 91, on conspiracy; also, monographic note to Spies v. People, 3 Am. St. Rep. 475-492.

MALICIOUS PROSECUTION AND FALSE IMPRISONMENT DISTINGUISHED—PROBABLE CAUSE—ATTORNEY'S ADVICE.—Arrest and imprisonment of a person on a charge which does not constitute a crime is not a cause of action for malicious prosecution; as an arrest and imprisonment on a charge of slander:

Kraus v. Spiegel, 94 Cal. 370; 28 Am. St. Rep. 137. If an imprisonment is under legal process an action for false imprisonment will not lie, and the remedy, if any exists, is by an action for malicious prosecution: Rich v. McInerny, 103 Ala. 345; 49 Am. St. Rep. 32. Neither malice nor want of probable cause need be proved to support an action for false imprisonment: Boeger v. Langenberg, 97 Mo. 390; 10 Am. St. Rep. 322, and note; while both are necessary to maintain an action for malicious prosecution: Note to Antcliff v. June, 21 Am. St. Rep. 546. The essential difference between an action for malicious prosecution and one for false imprisonment is that in the former the imprisonment must have been under legal process issued as the result of a prosecution commenced or continued maliciously, and without probable cause, while the latter lies for an imprisonment which is extrajudicial and without legal process, and from which the prosecutor cannot escape liability by proving that he acted upon probable cause and without probable cause: See monographic note to Ross v. Hixon, 26 Am. St. Rep. 128. Legal advice sought, received, and acted upon, after a truthful and fair statement of the facts as understood by the prosecutor, is a defense to an action for malicious prosecution: Barhight v. Tammany, 158 Pa. St. 545; 38 Am. St. Rep. 853, and note; monographic note to Ross v. Hixon, 26 Am. St. Rep. 144.

False Imprisonment.

Definitions and description.—False imprisonment consists in the unlawful detention or restraint of a person contrary to his will: Rich v. McInerny, 103 Ala. 345; 49 Am. St. Rep. 32; Kirk v. Garrett, 84 Md. 383; State v. Lunsford, 81 N. C. 528. It is the unlawful restraint of a person without his consent, either with or without process of law: Johnson v. Bouton, 35 Neb. 898. A comprehensive definition of false imprisonment is given in Comer v. Knowles, 17 Kan. 436-440, as follows: "False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong of false imprisonment may be committed by words alone, or by acts alone, or by both, or by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual should be confined within a prison, or within walls, or that he be assaulted or even touched. It is not necessary that any injury should be done to the individual's person, or to his character or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention. Nor is it necessary that the act should be done under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard": Comer v. Knowles, 17 Kan. 441. False imprisonment is in the nature of a trespass to the person committed by one against another in unlawfully arresting or detaining him against his will: Burns v. Erben, 40 N. Y. 463-466.

It is false imprisonment to detain another by threats of violence to his person, or deprive him of his freedom of going where he will by well grounded apprehension of personal danger, though no assault is committed. "It is not necessary to constitute false imprisonment that the person restrained of his liberty should be

touched or actually arrested, if he is ordered to do, or not to do, the thing, or move or not to move against his own free will, if it is not left to his own option to go or stay where he pleases, and force is offered or threatened, and the means of coercion are at hand ready to be used, or there is reasonable ground to apprehend that coercive means will be used, if he does not yield. A person so threatened need not wait for its actual application. His submission to the threatened and reasonably to be apprehended force is no consent to the arrest, detention, or restraint of the freedom of his motion; he is as much imprisoned as if his person were touched, or force actually used. The imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease, and the means of effecting it are removed": Johnson v. Tomkins, 1 Bald. 571--602.

Words are sufficient to constitute a false imprisonment if they impose an unlawful restraint upon the person who is accordingly restrained: Pike v. Hanson, 9 N. H. 491. To constitute the offense of false imprisonment no actual force is necessary; it is sufficient if the opposition to the prosecutor's going forward is such that a prudent man would not take the risk of doing so: Smith v. State, 7 Humph. 43. And such offense may consist in preventing a person from going in such direction as he sees proper without detaining him in any particular spot: Harkins v. State, 6 Tex. App. 452. An actual manual arrest of the person is not necessary to constitute this offense, and an actual demonstration of physical violence, which to all appearances can only be avoided by submission, operates as effectually, if submitted to, as if the arrest or detention had been forcibly accomplished: Brushaber v. Stegemann, 22 Mich. 267; Herring v. State, 3 Tex. App. 108; Hildebrand v. McCrum, 101 Ind. 61; McNay v. Stratton, 9 Ill. App. 215; Mauer v. State, 8 Tex. App. 361. In order to constitute false imprisonment, it is not necessary that the defendant use violence, or lay hands on the plaintiff to confine him in any jail or prison, but it is sufficient if the defendant, at any place or time, or in any manner, restrain the plaintiff of his liberty, or detain him in any manner from going where he wishes, or prevent him from doing what he desires: Hawk v. Ridgway, 33 Ill. 473; Bissell v. Gold, 1 Wend. 210; 19 Am. Dec. 480; Mowry v. Chase, 100 Mass. 79; Ahern v. Collins, 39 Mo. 145; Bonesteel v. Bonesteel, 28 Wis. 245.

Every unlawful confinement of the person is a false imprisonment, whether it be in a common prison or in a private house, or even by forcibly detaining one in the public street: Floyd v. State, 12 Ark. 43; 54 Am. Dec. 250. An action for false imprisonment will not lie when the plaintiff has not been arrested, nor in any way deprived of his freedom of action, and though his manual seizure is not necessary to an arrest, there must be some sort of personal coercion: Hill v. Taylor, 50 Mich. 549; Greathouse v. Summerfield, 25 Ill. App. 296.

To constitute false imprisonment the original restraint or detention of the person must have been unlawful, or there must have

been an abuse of legal process: Crowell v. Gleason, 10 Me. 325, for the reason that the imprisonment is not false unless the arrest or detention is extra-judicial or without legal process: Murphy v. Martin, 58 Wis. 276; Boaz v. Tate, 43 Ind. 60. But an action for false imprisonment may be maintained for the misuse or abuse of regular legal process: Wood v. Graves, 144 Mass. 365; 59 Am. Rep. 95.

The unlawfulness of the detention of the person is the gravamen of false imprisonment, and consequently it may be committed without malice on the part of the person causing the detention. Hence, in an action for false imprisonment, it is not necessary to allege or prove malice, and an allegation that the plaintiff was forcibly, unlawfully, and falsely imprisoned is a sufficient averment of want of probable cause: Akin v. Newell, 32 Ark. 605; Comer v. Knowles, 17 Kan. 436; Boaz v. Tate, 43 Ind. 60; Cotler v. Lower, 35 Ind. 285; 9 Am. Rep. 735. One who participates in, or instigates, or encourages an unlawful arrest or detention is liable, however pure his motives: Christman v. Carney, 33 Ark. 316. Malice need not exist, though if present it may be considered in aggravation of damages: Rich v. McInerny, 103 Ala. 345; 49 Am. St. Rep. 32; Johnson v. Bouton, 35 Neb. 898.

Arrest with Regular Process.—No rule of law is better settled than that which holds that a ministerial officer, acting under a warrant or process fair and regular upon its face, and issuing from a tribunal with apparent jurisdiction to issue it, is protected thereby in its execution against all irregularities and illegalities except his own, and cannot be held liable for false imprisonment: Rich v. McInerny, 103 Ala. 345; 49 Am. St. Rep. 32; Atwood v. Atwater, 43 Neb. 147; Marks v. Sullivan, 9 Utah, 12; Finley v. St. Louis etc. Co., 99 Mo. 559; Messman v. Ihlenfeldt, 89 Wis. 585; Wheaton v. Beecher, 49 Mich. 349; Slomer v. People, 25 Ill. 70; 76 Am. Dec. 786; Leib v. Shelby Iron Co., 97 Ala. 626; Ressler v. Peats, 86 Ill. 275; Floyd v. State, 12 Ark. 46; 54 Am. Dec. 250; Henke v. McCord, 55 Iowa, 378; Trammell v. Russellville, 34 Ark. 105; 36 Am. Rep. 1; Hallock v. Dominy, 69 N. Y. 238; Gaines v. Newbrough, 12 Tex. Civ. App. 466; Whitten v. Bennett, 77 Fed. Rep. 271; 86 Fed. Rep. 405; Bugbee v. Boyce, 68 Vt. 311; Pepper v. Mayes, 81 Ky. 673. Thus when a court, though of inferior and local jurisdiction, has general jurisdiction of an offense committed, and entertains a complaint, and thereupon issues process fair upon its face to an officer, the process is a justification to the officer in doing the acts thereby required, although the law under which the court acts is invalid; and no action lies against such officer or his sureties for an arrest made by him under such process: Hofschulte v. Doe, 78 Fed. Rep. 436.

It is not necessary that a warrant of commitment, under which one is confined in jail to await the action of a grand jury, should set forth all the facts essential to constitute a crime. It is enough if it clearly designates the offense of which the prisoner is accused, and shows that, upon examination before the committing magistrate, it had appeared that such offense had been committed, and that there was probable cause to believe the accused to be guilty thereof. Such process is a justification to the officer who executes

it: Collins v. Brackett, 34 Minn. 339. If an officer or other defendant in an action for false imprisonment attempts to justify the arrest under warrant or process, he must show that it was issued by a court having jurisdiction, and that it was regular on its face, with nothing thereon to apprise him that in that particular case there was no authority to issue it: Floyd v. State, 12 Ark. 43; 54 Am. Dec. 250; Mitchell v. State, 12 Ark. 50; 54 Am. Dec. 253.

It is also a general rule that one who procures the arrest of another under a writ issued by a court having jurisdiction and regular on its face is not liable for false imprisonment. In other words, when the facts stated in the affidavit are sufficient to authorize the issuance of a warrant of arrest, and to give the judicial officer authority to issue it, and the warrant issued thereon is regular on its face, the person procuring its issuance is not liable in an action for false imprisonment, even though the issuance of such warrant was erroneous because of facts not disclosed: Mark v. Townsend, 97 N. Y. 590; Johnson v. Morton, 94 Mich. 1. If the facts set forth in the affidavit, though slight and inconclusive, yet tend to prove an offense, and the court, after examination, issues an order of arrest, no action of false imprisonment can lie against the party procuring such order for a detention thereunder, if the other proceedings are regular: Gillett v. Thiebold, 9 Kan. 427; Day v. Bach, 87 N. Y. 56; Wagstaff v. Schippel, 27 Kan. 450.

It seems that the party so procuring the warrant is not liable in an action for false imprisonment, even though it was procured maliciously and without probable cause: Marks v. Townsend, 97 N. Y. 590; Krebs v. Thomas, 12 Ill. App. 266.

The person making the complaint upon which the warrant issues is not liable if he states the facts to the magistrate, even though such facts do not authorize the issuance of a warrant: Wheaton v. Beecher, 49 Mich. 348; Fenelon v. Butts, 49 Wis. 342; Von Latham v. Libby, 38 Barb. 339; Murphy v. Walters, 34 Mich. 180; Newman v. Davis, 58 Iowa, 447. If one in good faith merely makes complaint before a magistrate of the commission of a public offense in a matter over which the magistrate has general jurisdiction, and the latter issues a warrant, upon which the person charged is arrested, the party laying the complaint is not liable for false imprisonment, although the particular case is one over which the magistrate has no jurisdiction: Gifford v. Wiggins, 50 Minn. 401.

An action for false imprisonment cannot be maintained when it is not shown that the imprisonment complained of was other than by a lawful officer under a legal warrant of arrest, duly issued by a magistrate upon a complaint under oath, regularly made by defendant charging a statutory offense, and there is no evidence that the defendant otherwise took any part in the arrest or imprisonment. The only remedy is for malicious prosecution: O'Neal v. McKinna, 116 Ala. 606. Where a party makes an affidavit for the purpose of procuring the legal arrest of another under regular process, he is not liable in case of an improper use of the affidavit by an officer, who illegally arrests and imprisons the party thereunder, without the knowledge and contrary to the intention of the party

making the affidavit: Roth v. Smith, 41 Ill. 314. So one who procures the arrest and imprisonment of another on a lawful warrant is not liable to an action for false imprisonment, although the warrant was obtained by false representations: Coupal v. Ward, 106 Mass. 289. The only protection needed by the party procuring the warrant of arrest is that it shall be sufficiently regular on its face to protect the officer who executes it: Wheaton v. Beecher, 49 Mich. 349. If one does nothing more than to make the complaint, upon which a warrant is regularly issued by a court having jurisdiction of the subject-matter and of the party arrested, the complainant is not liable in the action under discussion, although the complaint is defective: Langford v. Boston etc. R. R. Co., 144 Mass. 431. For it is always a good defense to an action for false imprisonment that the arrest was under lawful and valid process, issued by a competent tribunal having jurisdiction: Herzog v. Graham, 9 Lea, 152; Jounder v. Ocean S. S. Co., 86 Ga. 238; Aldrich v. Weeks, 62 Vt. 89.

If the court to which application is made for an order to arrest a defendant in a civil case has jurisdiction to pass upon the sufficiency of the evidence disclosed by the affidavit to procure the order of arrest, the party applying for it cannot be held responsible, unless there was entire lack of evidence or of some essential fact which the law requires to be shown: Dusy v. Helm, 59 Cal. 188. An attorney at law is not liable for false imprisonment where, in a judicial proceeding, he presents documents to a court of competent jurisdiction, which, after consideration and hearing, grants an order of arrest, though such documents are afterward set aside for error in issuing them. The error of the court protects the attorney: Fisher v. Langbein, 62 How. Pr. 238.

If an officer and the complainant combine to extort money from the person complained against and in custody under a valid warrant, by working on his fears, they are liable to an action for false imprisonment: Holley v. Mix, 3 Wend. 350; 20 Am. Dec. 702. Or the action may be maintained where one procures process without cause, and procures the arrest of another for the purpose of extorting money from him: Stoddard v. Bird, Kirby, 65. But where the arrest is under a warrant valid in form, issued by competent authority on a sufficient complaint, it is not false imprisonment, though the indictment under which the warrant was issued was procured maliciously and by artifice and misrepresentation for the purpose of extorting money: Whitten v. Bennett, 86 Fed. Rep. 405; and if the proceedings under which the warrant is obtained is a sham on the part of the complainant, he is liable in damages for an arrest made thereunder: Fellows v. Goodman, 49 Mo. 62. If an arrest made under a lawful warrant is in fact unlawful, and its continuation is for the benefit of the complainant, and he approves of it, the imprisonment is false and he is liable in damages therefor: Fenelon v. Butts, 53 Wis. 344. Although a person commands officers to arrest another, and falsely accuses the latter of crime, giving the officers facts upon which such accusation is based, maliciously and without probable cause, resulting in his arrest and imprisonment,

he is not liable to an action for false imprisonment if the arrest was not based upon his command nor direction, and the officers acted upon their own volition: Rich v. McInerny, 103 Ala. 345; 49 Am. St. Rep. 32. If a private person takes any part in the unlawful imprisonment of another by an officer, he becomes a principal in the act, and is liable therefor, but if he merely communicates facts and circumstances of suspicion to the officer, leaving him to act on his own judgment, he is not liable: Brown v. Chadsey, 39 Barb. 253.

If an arrest and imprisonment of one charged with crime is ordered by one member of a firm, the other partner, who knew nothing about the matter beforehand, and did not ratify the imprisonment, is not liable in damages therefor: Kirk v. Garrett, 84 Md. 383.

Arrest under Void Process.—As a simple unlawful detention of the person, unaffected by any question of motive or purpose, constitutes false imprisonment, the want of lawful authority is necessarily an essential element of the offense. Hence anyone concerned in the procurement of the arrest and imprisonment of another upon a void process is liable in an action for false imprisonment, and mere good faith in procuring or authorizing such arrest is no defense. This, proceedings resulting in an unauthorized judgment, and a mittimus, void on its face on the same ground, afford no justification to the justice before whom they were taken, or to the officer who executed them, as against an action by the person thereby unlawfully imprisoned: Sheldon v. Hill, 33 Mich. 170. A justice of the peace acts ministerially in issuing and delivering a criminal warrant to an officer to be executed, and, if such warrant is not valid on its face, both the justice and the officer are liable to the party arrested under it, although they acted in good faith, and although there was sufficient proof before the justice to have authorized him to issue a valid warrant: Blythe v. Tompkins, 2 Abb. Pr. 468. If a mittimus issued by a justice of the peace is void, he and all parties concerned are liable for an arrest made under it: Clyma v. Kennedy, 64 Conn. 310-319; 42 Am. St. Rep. 194-197. A justice of the peace committing a prisoner on a complaint showing on its face that the offense charged is barred by the statute of limitations, is liable in a civil action for damages: Vaughn v. Congdon, 56 Vt. 111; 48 Am. Rep. 758. A warrant of arrest for obtaining goods by false pretenses, which shows on its face that the complainant, from whom the goods were obtained, knew at the time the falsity of such pretenses, is bad, and constitutes no protection to the officer making the arrest, who is thus rendered liable for a false imprisonment: Lueck v. Heisler, 87 Wis. 644. Neither can an officer justify the execution of a mittimus which shows an excess of jurisdiction on its face: Pooler v. Reed, 75 Me. 488. And a city marshal and chief of police who is present and directs the execution of such mittimus by one of his subordinates, and makes return thereof, as executed by himself, cannot avoid the responsibility which he thereby assumes, and is liable to the party arrested for his unnecessary loss of time; and the reasonable expense of procuring his liberation on habeas corpus: Pooler v. Reed, 75 Me. 488. In an action for false imprisonment,

a warrant, void on its face, is no defense to one on whose complaint the warrant was issued: Gelzenleuchter v. Niemeyer, 64 Wis. 316; 54 Am. Rep. 616. One who procures the arrest and imprisonment of another upon void process is liable therefor, although he acted in good faith in making the affidavit upon which such arrest was made: Painter v. Ives, 4 Neb. 122; Thorpe v. Wray, 68 Ga. 359. One who applies to a county judge to issue an attachment for the arrest of another, and who receives and delivers it to an officer for service, is liable for the arrest in case the attachment is void for want of jurisdiction or for any other cause: Miller v. Adams, 52 N. Y. 409; Hewitt v. Newburger, 141 N. Y. 538. One who sues for a wrongful imprisonment is entitled to recover if he pleads and proves that such imprisonment was procured by the defendant through the means of a void warrant: Bauer v. Clay, 8 Kan. 580. If an affidavit upon which a circuit court commissioner indorses an order to hold to bail in a libel case shows upon its face that the alleged libelous publication was, as matter of law, privileged, the order is void, and affords no protection to the parties instituting the proceeding, procuring the order and delivering it to the sheriff to serve: Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 427. "An arrest and imprisonment in a civil case upon void process is as one without process, and cannot be justified. Good faith, honest belief, and the advice of counsel may be shown to rebut the presumption of malice and to avoid punitive damages, but not to justify an arrest and imprisonment under an absolutely void process": Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 429; citing Johnson v. Maxon, 23 Mich. 129; Johnson v. Morton, 94 Mich. 1; Vredenburgh v. Hendricks, 17 Barb. 179; Fischer v. Langbein, 103 N. Y. 84; Miller v. Adams, 52 N. Y. 409; Bonesteel v. Bonesteel, 28 Wis. 245; Fenelon v. Butts, 53 Wis. 344. If a complaint charging larceny and the warrant issued thereon fail to state the value of the thing stolen, the warrant is void on its face and no justification for an arrest, and persons who procured such warrant, and delivered it to the officer, directing him to make an arrest thereon, are equally liable with him for damages, and the fact that they submitted the case to the district attorney and acted upon his advice is immaterial, except upon the question of the amount of damages: Frazier v. Turner, 76 Wis. 562. If a probate court allows an injunction, but an undertaking therefor is never given, a fine, with imprisonment for its nonpayment, imposed upon the party enjoined for an alleged contempt in disregarding such injunction, is not authorized, and the party so imprisoned has a right to recover damages against the person causing his imprisonment without alleging malice or want of probable cause: Diehl v. Friester, 37 Ohio St. 473.

It is one of the risks and hazards of a sheriff's office for the sheriff to determine at his peril whether he can or cannot detain a party in custody under a certain writ placed in his hands for service; and if he detains a person under a writ issued by a court having no jurisdiction of the subject-matter, he is liable for false imprisonment: Fisher v. Langbein, 62 How. Pr. 238; Johnson v. Von Kettler, 66 Ill.

63; Peck v. Rorks, 22 Ark. 221; Barhydt v. Valk, 12 Wend. 145; 27 Am. Dec. 124; Harwood v. Siphers, 70 Me. 464.

Arrest Without Warrant or Process.—It is a well-settled rule that a sheriff, constable, policeman, or other peace officer, is justified in arresting, without warrant or process, one who is committing a breach of the peace in his presence, or he may, upon reasonable suspicion and in good faith, arrest a person charged with the commission of a felony, although no crime of that character was in fact committed, and is not liable for false imprisonment for such act: Rohan v. Sawin, 5 Cush. 281; Kirk v. Garrett, 84 Med. 383; Neal v. Joyner, 89 N. C. 290; Eanes v. State, 6 Humph. 53; 44 Am. Dec. 289; Burnes v. Erben, 40 N. Y. 463; Quinn v. Heisel, 40 Mich. 576; McCarthy v. DeArmit, 99 Pa. St. 63; Bryan v. Bats, 15 Ill. 87; Commonwealth v. Tobin, 108 Mass. 426; 11 Am. Rep. 375; Holley v. Mix, 3 Wend. 350; 20 Am. Dec. 702; Wade v. Chaffee, 8 R. I. 1; 5 Am. Rep. 572; Doering v. State, 49 Ind. 56; 19 Am. Rep. 669; State v. Underwood, 75 Mo. 230; Ballard v. State, 43 Ohio St. 340; Veneman v. Jones, 118 Ind. 41; 10 Am. St. Rep. 100; Fulton v. Staats, 41 N. Y. 498.

There are, however, many cases in which an officer is liable for making an arrest without a warrant. Thus an officer has no right to arrest without a warrant, after an offense has been committed, in any case where the punishment attached to that offense is only a fine or imprisonment in a jail: Bright v. Patton, 5 Mackey, 534; 60 Am. Rep. 396.

If one arrested by an officer for a misdemeanor committed in his presence, consents to his discharge from custody without a complaint being made against him, intending thereby to release any damages on account of his arrest, and such agreement is fairly and intelligently made, he cannot maintain an action against the officer, although the arrest was made subsequent to the offense: Caffrey v. Drugan, 144 Mass. 294.

If a sheriff, upon receiving a request by letter, and without any warrant or other authority, proceeds to another county than his own and arrests a person, carrying him into his county and imprisoning him, and subsequently sending him to the county from whence the request came, he is liable for false imprisonment upon its being ascertained that the prisoner is not the party wanted and he is in consequence discharged from arrest: Mitchell v. Malone, 77 Ga. 301.

Probable Cause, so far as material in actions for false imprisonment, arises in these cases of arrest without warrant, and instances will be given where such probable cause for the arrest of the complainant has been or has not been held to be a sufficient justification. Thus a defendant procuring an arrest without any legal warrant, authority, or reasonable or justifiable cause is guilty of false imprisonment, although he was not actually present when the arrest was made: Floyd v. State, 12 Ark. 43; 54 Am. Dec. 250. And a private person is always liable for the arrest and imprisonment of one whom he induces an officer to arrest without a warrant, and without an offense having been committed in view of the officer, unless he justifies by showing that his charge was well founded: Veneman v. Jones, 118 Ind. 41; 10 Am. St. Rep. 100.

Probable cause for securing an arrest is such reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party arrested was guilty: Rich v. McInerny, 103 Ala. 345; 49 Am. St. Rep. 32. It has been held that a person who causes the arrest and imprisonment of another, without showing probable cause for his conduct, is liable in damages, and that the acquittal of the person arrested, after a trial or an examination, is presumptive evidence of want of probable cause for the arrest: Letzler v. Huntington, 24 La. Ann. 330; McGarrahan v. Lavers, 15 R. I. 302. It has also been held that a magistrate has no authority to issue a warrant for an arrest in a criminal case upon a complaint, the facts of which are stated upon information and belief, if the attendance of the person from whom the information was derived can be procured; and, when a person has been arrested without any competent evidence of his guilt, the magistrate and prosecutor are jointly liable in damages therefor: Comfort v. Fulton, 13 Abb. Pr. 276; Wilson v. Robinson. 6 How. Pr. 110. If, however, the facts and circumstances stated in the complaint upon which a criminal warrant was issued show that a crime had been committed, and are sufficient to call for the judicial determination of the magistrate as to whether there is reasonable ground to believe that the accused committed the crime charged, the prosecutor is protected against an action for false imprisonment, although the magistrate may have erred in judgment: Swart v. Rickard, 148 N. Y. 264. And when the facts and grounds actually exist, or the complainant has probable cause to believe that they exist, on which an order of arrest is made, the person who caused the arrest to be made is not liable in damages merely because the affidavit and order of arrest are not regular or in proper form: Ogg v. Murdock, 25 W. Va. 139. But an officer is bound to know the law, and if he makes an arrest upon facts which, if true, furnish no justification, he is a wrongdoer and is liable therefor. Thus, if he makes an arrest on the strength of a letter from a chief of police in another state, not stating facts constituting a crime in the state where received, and detains the prisoner as a matter of official courtesy, the imprisonment is false: Malcolmson v. Scott, 56 Mich. 459. If, however, an officer, in arresting a fugitive from justice whom he honestly believes to have committed a felony, has acted in good faith, and after such investigation of the facts as he was able to make, he is protected in his action and relieved from the consequences of a false imprisonment: White v. McQueen, 96 Mich. 249. In an action for false imprisonment, procured by defendant's affidavit that he believed that plaintiff was about to leave the state, the plaintiff can recover unless the defendant can show that he actually believed the statements made in his affidavit, and that he had probable cause and good reason to so believe: Gee v. Patterson, 63 Me. 49.

An officer who arrests and imprisons one upon reasonable suspicion that a felony has been committed by him is excused from liability, even though it appear afterward that in fact no felony has been committed: McCarthy v. DeArmit, 99 Pa. St. 63. Prob-

able cause for an arrest exists, protecting the prosecutor and the magistrate issuing the warrant of arrest, when the defendant has obtained goods from the prosecutor under pretense of a contract, and though a lie, although perhaps the defendant was not technically guilty of obtaining goods by false pretenses or of embezzlement: Neall v. Hart, 115 Pa. St. 347; 2 Am. St. Rep. 559. An arrest without a warrant of an alleged prostitute, or street walker, by an officer on mere suspicion that she is plying her vocation upon the street without any act being committed in his presence indicating that she is there for that purpose, is illegal and without probable cause, although the officer is authorized to arrest upon view any person found violating the laws of the state: Pinkerton v. Verberg, 78 Mich. 573; 18 Am. St. Rep. 473.

The arrest of the wrong person by honest mistake renders all the persons causing the arrest or participating therein liable for the injury, unless the party arrested has brought the arrest upon himself by his own misstatements: Hays v. Creary, 60 Tex. 445. Thus, a constable having a warrant for the arrest of one person, who arrests another, thinking and believing that he was the party named in the warrant, is liable for actual damages arising from such arrest: Holmes v. Blyler, 80 Iowa, 365. And when a person is the directing and procuring cause of the arrest and imprisonment of another, by pointing him out and beckoning him to come to an officer, without knowing or inquiring his name or residence, and acting solely on suspicion that he answers a description received by telegram charging the commission of a crime, the arrest is made without probable cause, and the person thus causing it to be made, if mistaken in the identity of the person arrested, is liable in damages for his imprisonment, although the arrest was caused without malice: Maliniemi v. Gronlund, 92 Mich. 222; 31 Am. St. Rep. 576. So a sheriff and his deputy are liable in damages for the arrest and imprisonment of one person under a warrant against another of the same name, although such arrest was made under an honest mistake as to identity: Wolf v. Perryman, 82 Tex. 113. A misnomer in the warrant of the person arrested subjects the actors to an action for false imprisonment: Scott v. White, 4 Wend. 555. And a defendant cannot justify the arrest and imprisonment of the plaintiff in an action for false imprisonment by the wrong name, though he was the person intended to be arrested, unless it is shown that he is known as well by one name as by the other: Griswold v. Sedgwick, 1 Wend. 126; Gurnsey v. Lovell, 9 Wend. 319. It has, however, been held that a mistake in the name of the person prosecuted for an offense does not render his arrest illegal, nor of itself constitute a false imprisonment if done under authority of process, although he is innocent of the offense charged: Allen v. Leonard, 28 Iowa, 529.

Arrest Under Erroneous Process.—Where the court has jurisdiction of the subject matter and of the person, and the complaint or affidavit presented is regular on its face, and the court, after due consideration and after hearing and acting judicially on such complaint, orders a commitment which is afterward vacated upon ground of error in the court, such error is a protection against an

action for false imprisonment in favor of every person who acts under such erroneous order of commitment: Fisher v. Langbein, 13 Abb. N. C. 10; 103 N. Y. 84; Goodwine v. Stephens, 63 Ind. 112. If the process is erroneous, but not absolutely void, the imprisonment is not false, even though sued out through bad or indefensible motives: Johnson v. Maxon, 23 Mich. 128; Marks v. Townsend, 97 N. Y. 590. The difference between void, irregular, and erroneous process seems to be that a void process furnishes no justification to a party for acts done under it, and it is not necessary that it should be set aside, before bringing the action; but if the writ is irregular merely, no action lies until it has been set aside, and when set aside it ceases to be a protection for acts done under it; but if the process is regularly issued in a case where the court has jurisdiction, the party procuring it and those acting under it may justify what has been done under it after it has been set aside for error: Day v. Bach, 87 N. Y. 56: Fisher v. Langbein, 103 N. Y. 84; Neimitz v. Conrad, 22 Or. 164. "The established law lying at the foundation of this action is that, if a person has been arrested and imprisoned under color of legal process, which is thereafter set aside for irregularity, the person who set that process in motion is responsible in damages to him upon whom the indignity and deprivation of liberty have been visited. Where the process is set aside for mere error committed by the court in the progress of the action, in contradistinction to irregular or void process, no responsibility may attach to him who caused its issue; but when it is vacated because it was irregular in its inception, responsibility at once attaches. In the one case a man acts irregularly and wrongfully, without the sanction of any law, and he therefore takes the consequences of his own unauthorized act. But where he relies on the judgment of a competent court, he is protected. He who causes void or irregular process to be issued, whereby injury comes to another against whom it is enforced, is liable in damages therefor. Where the process is void, the right of action for the injury attaches when the wrong is committed and no judgment vacating the process is required. Process, however, that a court had general jurisdiction to award, but which is irregular by reason of nonperformance by the party procuring it of same preliminary requisite, or the exercise of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of court before an action can be maintained for damages occasioned by its enforcement. In such cases the process is considered the act of the party and not of the court, and he is therefore made liable for the consequences of his act.

"Void process is defined to be such as was issued without power in the court to award it, or which the court has not acquired jurisdiction to issue in the particular case, or which fails in some material respect to comply with the form requisite to legal process. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such case. The order made or judgment rendered by a court, which is simply reversed as erroneous, nevertheless affords

protection to all persons acting under it. Error as thus applied consists in nonconformity to the rules of procedure in an action in which the court is authorized to hear but not affecting any jurisdictional fact which can be taken advantage of only by appeal or motion in the original action": Bryan v. Congdon, 86 Fed. Rep. 221-223.

Unreasonable Detention after Arrest.—When a person is arrested either with or without a warrant, it is the duty of the officer or other person making the arrest to carry the prisoner before a magistrate for examination and commitment without unnecessary delay, and if the party detains the accused in custody an unreasonable time before taking him before a magistrate, he is guilty of a false imprisonment, no matter how lawful the original arrest may have been. If the facts are undisputed, the question of reasonable time is for the court to decide, otherwise the jury must decide it: Kirk v. Garrett, 84 Md. 383; Manning v. Mitchell, 73 Ga. 660; Ocean Steamship Co. v. Williams, 69 Ga. 251; Diers v. Mallon, 46 Neb. 122; 50 Am. St. Rep. 598.

While an arrest on an exigency where reasonable grounds for suspicion exist, may be made without a warrant, the duty of the officer or person making the arrest is to take the accused before a magistrate as soon as possible, for formal accusation and hearing, and a failure to perform this duty, followed by subsequent detention of the party arrested, is false imprisonment: Burk v. Howley, 179 Pa. 539; 57 Am. St. Rep. 607. And though an arrest without a warrant is justifiable, yet to detain the prisoner longer than a reasonable time for suing out a warrant, then to handcuff him, carry him out of the county, and there incarcerate him for days without warrant or examination, is false imprisonment: Potter v. Swindle, 77 Ga. 419.

Officers who cause and take part in prolonging imprisonment of one arrested without a warrant, beyond the doors of the lock-up, for the purpose of sending him out of town after the marshal has reason to believe him innocent, and has made up his mind to release him, are liable for damages even if the arrest was lawful, and a fortiori if it was unlawful: Bath v. Metcalf, 145 Mass. 274; 1 Am. St. Rep. 455. Where an officer arrests one without a warrant on suspicion of his having committed a crime in another state, and detains him for five days before taking him before a magistrate when there is nothing to prevent him from doing so immediately after the arrest, and then releases him from custody without an examination, the detention is unreasonable, and the officer is liable: Cochran v. Toher, 14 Minn. 385. So an arrest under a warrant and subsequent detention for thirty days without an examination, and until the prisoner is released on habeas corpus, is unreasonable, and renders the officer making the arrest liable for false imprisonment: Anderson v. Beck, 64 Miss. 113.

If a person is constantly guarded and kept under restraint, and controlled and directed as to his movements for two weeks by detectives without a warrant or examination, he is unreasonably deprived of his liberty and may recover damages from the party who thus causes him to be restrained: Fotheringham v. Adams Exp. Co.,

36 Fed. Rep. 252. And an officer who arrests a judgment debtor on execution, cannot lawfully hold him in custody against his consent, in order to procure an interview with the creditor or his attorney for the purpose of negotiating with the debtor, or for any other purpose designated by the creditor alone. Such detention is unlawful, and renders the officer liable: French v. Bancroft, 1 Met. 502.

Unavoidable delay of a peace officer in taking bail for a prisoner does not render him liable: Cargill v. State, 8 Tex. App. 433. And an officer will always be allowed a reasonable time in which to procure an examination for the party arrested. Thus, if an arrest is made on Sunday, the prisoner need not be taken before a magistrate for a warrant or examination on that day, and if the attendance of witnesses cannot be procured until the following Tuesday, and the prisoner is given as speedy a hearing as the circumstances will permit, the detention until such hearing is not unreasonable: Diers v. Mallon, 46 Neb. 121-131; 50 Am. St. Rep. 598. Or, if a person is arrested under a peace warrant in the forenoon on Saturday and at that time committed to jail without an examination because of his drunken condition, the justice is not liable unless the imprisonment is continued for an unreasonable time, although it does continue without examination over the following Sunday: Pepper v. Mayes, 81 Ky. 673. If the court is in session at the time that the warrant is delivered to the officer, but is not in session when the officer, acting promptly, arrives with his prisoner at the place where the court is sitting, it is his duty to detain his prisoner until the court is in session, and he may lodge him in jail, in the meantime, without becoming liable therefor: Kent v. Miles, 68 Vt. 48. The fact that a drunken man's first proposition when arrested is to give a bond, and that is refused and he is detained in jail for an hour, does not constitute a false imprisonment: Beville v. State, 16 Tex. App. 70. Or, if a drunken man is confined in jail for three hours after his arrest before he is regularly charged before a justice of the peace, the arresting officer is not liable, as such detention is not unreasonable: Wiltse v. Holt, 95 Ind. 469.

Arrest by Private Party.—The right of a private person to arrest without a warrant is more restricted than that of an officer, but it is the right and duty of such party who witnesses the commission of a felony or breach of the peace to apprehend the offender at once: Phillips v. Trull, 11 Johns. 486; Morley v. Chase, 143 Mass. 396-398; Brockway v. Crawford, 3 Jones, 433; 67 Am. Dec. 250; Vendeveer v. Mattocks, 3 Ind. 479. But a private person can only justify for an arrest without a warrant on suspicion of felony by proving that a felony has actually been committed, and that he has probable cause for believing that the person arrested is the person who committed it: Morley v. Chase, 143 Mass. 396, 398; Maliniemi v. Gronlund, 92 Mich. 222; 31 Am. St. Rep. 576; Brooks v. Commonwealth, 61 Pa. St. 352; 100 Am. Dec. 645; Holley v. Mix, 3 Wend. 350; 20 Am. Dec. 702; Burns v. Erben, 40 N. Y. 463; Reuck v. McGregor, 32 N. J. L. 70. If an innocent person is arrested upon suspicion by a private person, such person is excused if a felony has in fact been committed and there is reasonable ground to suspect the person arrested.

But if no felony has been committed, and an arrest is made by a private party without warrant, such arrest is illegal, though an officer would be justified if he acted, in making such an arrest, upon information from another which he had reason to rely upon: Hawley v. Butler, 54 Barb. 490; Holley v. Mix, 3 Wend. 350; 20 Am. Dec. 702. An arrest which is justifiable when made regularly by a proper officer cannot be justified if made by a private party irregularly: Reuck v. McGregor, 32 N. J. L. 70. While a private person is permitted to arrest without a warrant and take before a magistrate a person who has committed a felony, yet for mere misdemeanor an arrest made in such way after their commission has entirely ended is illegal and false: Phillips v. Trull, 11 Johns. 486; People v. Adler, 3 Park. C. C. 249. An arrest by a private individual without warrant, for the purpose of forcibly abducting him from the state, followed immediately by such abduction, cannot be justified, and renders the party guilty thereof liable in damages for a false imprisonment: Mandeville v. Guernsey, 51 Barb. 99. If a private person without warrant arrests another as a fugitive from justice, he must take him without delay before the nearest magistrate qualified to receive an affidavit and issue a warrant, and if he is detained beyond a reasonable time without being taken before such magistrate the person arresting or detaining him commits false imprisonment, and is liable therefor, especially if the party arrested and detained is not the alleged fugitive: Lavina v. State, 63 Ga. 513.

Private Citizen Aiding Officer.—A private individual is bound to assist a known public officer in making an arrest when called upon to do so, and is protected in so acting without inquiring into the regularity or legality of the process in the hands of the officer: McMahan v. Green, 34 Vt. 69; 80 Am. Dec. 665; Reed v. Rice, 2 J. J. Marsh. 44; 19 Am. Dec. 122; Forrest v. Leavitt, 52 N. H. 481; Payne v. Green, 10 Smedes & M. 507; Jennings v. Carter, 2 Wend. 446; 20 Am. Dec. 635; Coyles v. Hurtin, 10 Johns. 85; Goodwine v. Stephens, 63 Ind. 112. A person who responds to the call of a known officer to assist in making an arrest is protected by the call against suit for false imprisonment, if in his acts he confines himself to the order and direction of the officer: Firestone v. Rice, 71 Mich. 377; 15 Am. St. Rep. 266. "We do not think that a man called upon by a sheriff is required, at his peril to ascertain whether the sheriff has a proper warrant or whether the offense charged against the person to be arrested is a felony, or that he may refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office in a criminal case. Therefore, the person who responds to the call of one whom he knows to be an officer is protected by the call from being sued for rendering the requisite assistance. The officer may not be acting legally, and may, therefore, be a trespasser, but the person assisting him, at his request or command, and who relies upon his official capacity and call, is protected by the law": Firestone v. Rice, 71 Mich. 380; 15 Am. St. Rep. 266. Persons called upon by an officer holding a warrant to assist in the search for and arrest of a party charged with crime, are protected against actions for false impris-

onment, whether they had the warrant at the time of the arrest or not: Kirbie v. State, 5 Tex. App. 60. And where an officer calls upon private citizens to assist him in making an arrest, those who aid him have a justification as broad as his own: Main v. McCarthy, 15 Ill. 442. If an officer, unable alone to arrest rioters assembled in a house, calls upon private citizens to guard such house and prevent the escape of the rioters while he goes away some distance for assistance, the citizens are protected by such call against any consequences arising from the arrest of such rioters by them during the absence of such officer: Coyles v. Hurtin, 10 Johns. 85. But private persons are only bound to aid an officer in making an arrest upon his call, in such cases as he himself is authorized to act, and they are held to the same strictness of authority as is required of the officer. Hence, if the act of the officer is unlawful, anyone assisting him with knowledge is equally liable with him, although he acts by the officer's commands: Mitchell v. State, 12 Ark. 50; 54 Am. Dec. 253. If a known public officer calls upon a citizen to aid him in the execution of process, the former can justify under the process, although the officer himself is guilty of a trespass, but where the party making the arrest is not a known officer, but only assumes to act in that particular case by special appointment, persons aiding the supposed officer are bound to know whether he is authorized to make the arrest or not, and in case he is a trespasser for want of authority, those aiding him are also liable: Dietrichs v. Schaw, 43 Ind. 177. So a mere volunteer who aids an officer in making an arrest is held to knowledge of his right to interfere, and acts at his peril: Kirbie v. State, 5 Tex. App. 60. If an arrest is made under a void process, the officer and anyone who aids and assists him, even though the latter acts under his command, are guilty of and liable for false imprisonment: Batchelder v. Currier, 45 N. H. 460; Hooker v. Smith, 19 Vt. 151; 47 Am. Dec. 679.

Judicial Officers.—It is a general rule that judges of superior courts or courts of general jurisdiction are not liable for false imprisonment for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly: Bradley v. Fisher, 13 Wall. 335; Lange v. Benedict, 73 N. Y. 12; 29 Am. Rep. 80; Yates v. Lansing, 9 Johns. 395; 6 Am. Dec. 290; Johnston v. Moorman, 80 Va. 131; Cooke v. Bangs, 31 Fed. Rep. 640; Trammell v. Russellville, 34 Ark. 105; 36 Am. Rep. 1. "The exemption of judges of the superior courts of record from liability for civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, cannot be affected by any consideration of the motives with which the acts are done. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is an usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible": Bradley v. Fisher, 13 Wall. 335-352. It may be laid down as a proposition of universal application that for a mere error of judg-

ment in the exercise of his jurisdiction and the execution of an act, no action can be maintained against the judge of any court of record: Busteed v. Parsons, 54 Ala. 393; 25 Am. Rep. 688; Atwood v. Atwater, 43 Neb. 147. Thus a rule for a contempt is the judicial act of the court issuing it, and therefore cannot be the foundation for an action for false imprisonment, however erroneously issued: Tavenner v. Morehead, 41 W. Va. 116; Landt v. Hilts, 19 Barb. 283; Gaines v. Newbrough, 12 Tex. Civ. App. 466.

As to courts of limited jurisdiction, the rule is that their judges are liable in a private action only for such acts as are either in excess of or outside of their jurisdiction, but they are not liable for errors in judgment. As to such judges, if they act in excess of their powers judicially, the whole proceeding is coram non judice and void, and they are personally liable; but if they act within their jurisdiction, adjudicating upon matters lawfully submitted to them, they are not so liable, no matter how erroneous their opinions may be: Bigelow v. Stearns, 19 Johns. 39; 10 Am. Dec. 189; People v. Liscomb, 60 N. Y. 559; 19 Am. Rep. 211; Adkins v. Brewer, 3 Cow. 209; 15 Am. Dec. 264; Pepper v. Mayes, 81 Ky. 673; Blythe v. Tompkins, 2 Abb. Pr. 468; Johnson v. Von Kettler, 66 Ill. 63. Thus a justice of the peace committing a person illegally arrested is liable if he has no jurisdiction over the latter: Dietrichs v. Schaw, 43 Ind. 175. So a justice issuing a warrant of arrest is liable if the affidavit therefor states none of the grounds required by the statute: Hauss v. Kohlar, 25 Kan. 640; Spice v. Steinruck, 14 Ohio St. 213; Von Kettler v. Johnson, 57 Ill. 109; Johnson v. Von Kettler, 66 Ill. 63; Proctor v. Prout, 17 Mich. 473. To justify an inferior magistrate in committing a person, he must have jurisdiction both of the subject matter of the complaint and of the person of the defendant, and where such person is charged with the commission of an act not constituting a crime, the justice acquires no jurisdiction to proceed in the matter, and if he attempts to enforce any process of commitment in such case, he is answerable to the defendant as a trespasser: De Courcey v. Cox, 94 Cal. 665. But a justice of the peace acting within his jurisdiction is not liable for mistakes of judgment in arriving at his conclusions, although the facts upon which he acts do not justify his conclusions: Marks v. Sullivan, 9 Utah, 12; Banister v. Wakeman, 64 Vt. 203; Atwood v. Atwood, 43 Neb. 147. If a magistrate has jurisdiction, defects or irregularities in the commitment do not render him liable: Heard v. Harris, 68 Ala. 43. A judge of a municipal court may imprison for contempt a witness who refuses to answer questions properly propounded to him, in an action in which the court has jurisdiction, and he is not liable therefor in a civil action under the rule that a judicial officer, acting within his jurisdiction, in a judicial capacity, is not liable in a private action for his judicial acts: Rudd v. Darling, 64 Vt. 456. Thus a justice of the peace has jurisdiction to issue a warrant for the arrest of a garnishee, who, having been summoned, refuses to appear and answer, and he is not liable for such arrest: Kelsey v. Klabunde, 54 Neb. 760. But if the arrest and imprisonment of the defendant is upon a warrant issued by a justice of the peace

upon an affidavit which gives him no jurisdiction, he is liable for false imprisonment: Paulus v. Grobben, 104 Mich. 43. A justice of the peace having jurisdiction of the person and of the subject matter of the suit, is not liable to respond in damages, because, in the exercise of his honest judgment, he holds an unconstitutional ordinance valid, and enforces it by the arrest and imprisonment of one who violates its provisions: Brooks v. Mangan, 86 Mich. 577; 24 Am. St. Rep. 137; Henke v. McCord, 55 Iowa, 378. A magistrate or justice has jurisdiction to order the arrest of one for a public offense committed in his presence, but he has no power, without an examination or hearing, to commit him to prison, and he is liable for so doing: Touhey v. King, 9 Lea, 422; Tracy v. Williams, 4 Conn. 107; 10 Am. Dec. 102. So it is false imprisonment if a justice orders a person accused of a criminal offense to be committed until a subsequent day for examination without having such person first brought before him: Pratt v. Hill, 16 Barb. 303. And an attachment against a person for contempt, issued by the registrar of a justice's court on affidavit, but without any order of the court, is invalid, and no justification in an action to recover for false imprisonment thereunder: Thompson v. Ellsworth, 39 Mich. 719.

Arrest under Void Ordinance.—A justice of the peace, acting in good faith and having jurisdiction of the person and of the subject matter, is not civilly liable in damages for an error of judgment, in holding an unconstitutional ordinance valid, and enforcing it by imprisoning the violator of it, nor is the officer making the arrest liable in such case: Brooks v. Mangan, 86 Mich. 576; 24 Am. St. Rep. 137. Nor is a person who, in good faith and without malice, makes the complaint in such case, liable in damages for the arrest made thereunder: Gifford v. Wiggins, 50 Minn. 401. A town is not responsible for the passage of an illegal ordinance by its council nor for the acts of the mayor in issuing a warrant, nor for the act of an officer making an arrest thereunder, nor is either of the latter personally liable: Trammell v. Russellville, 35 Ark. 105; 36 Am. Rep. 1. Cities are not liable for the acts of their police officers in the enforcement of police regulations and ordinances, and cannot make themselves liable by the ratification of such acts: Calwell v. Boone, 51 Iowa, 687; 33 Am. Rep. 154; Odell v. Schroeder, 58 Ill. 353. And a party who has been arrested for the violation of an unconstitutional ordinance requiring a license fee to be paid by nonresident peddlers, and, on conviction, has served out his fine in jail, cannot maintain an action against the municipal corporation enacting such ordinance for false imprisonment: Trescott v. Waterloo, 26 Fed. Rep. 593.

Jailers.—The rules applicable to officers who make an arrest are generally applicable to jailers, or those who detain the person arrested after the arrest. It has been held that a jailer holding a prisoner as agent for the private purpose of a sheriff who has illegally arrested such prisoner must stand or fall upon the defenses which the sheriff makes, although the process under which the jailer is acting is regular on its face: Arteaga v. Connor, 88 N. Y. 404. But the right, under proper and legal process, given to a city marshal to arrest and imprison a person in the county jail comes with

the right on the part of the jailer to receive and detain the prisoner: Boaz v. Tate, 43 Ind. 60. And if the officer, after making the arrest, takes the prisoner to a jail and there declares that he has been arrested for an offense committed in the presence of the officer, such declaration stands in the place of a mittimus, and the jailer, by receiving the prisoner as such, does not become liable for the former wrongful acts of the officer: Boaz v. Tate, 43 Ind. 60. A conviction and sentence of a person to the penitentiary by a court having no jurisdiction are nullities, and afford no protection to those who keep him in confinement under such sentence, as they are presumed to know the law and that they have no right to keep him imprisoned: Patterson v. Prior, 18 Ind. 440; 81 Am. Dec. 367. A jailer is not liable for refusing to discharge a debtor on a defective order for his discharge, being advised that it is defective by counsel, although he would be protected by the order in case he discharged the prisoner thereunder: Hayes v. Bowe, 12 Daly, 193.

Attorneys.—If they become the instrument for imprisoning a party against whom they know their client has no just claim or cause for arrest and that the client is actuated by illegal and malicious motives, they are liable to the injured party, and it is not necessary to show the conspiracy between the attorneys and their client, because an attorney may so act under his general employment, to enforce a legal claim, as to render himself alone liable for the malicious and unlawful arrest of another: Burnap v. Marsh, 13 Ill. 536. Thus a capias ad satisfaciendum issued on a judgment which has been previously paid will protect the officer making the arrest, but not the attorney who issues it: Deyo v. Van Valkenburgh, 5 Hill, 242. Any arrest procured by an attorney under a judgment which does not warrant or justify it renders him liable in damages therefor: Sleight v. Leavenworth, 5 Duer, 122. And an attorney who, through malice, illegally sues out a ca. sa. in the name of his principal is liable in damages for the unlawful imprisonment which follows under it: Warfield v. Campbell, 35 Ala. 349. If, however, a court has jurisdiction of the subject matter of the action and of the person, and papers are presented by an attorney which are regular on their face, and the court, after a hearing and consideration, acts judicially upon such papers, orders a commitment, which is afterward vacated for error in the court, such error protects the attorney, and he is not liable for the imprisonment under such commitment: Fisher v. Langbein, 13 Abb. N. C. 10; affirmed in Fischer v. Langbein, 103 N. Y. 84, where the court also held that where the jurisdiction of the court was made to depend upon the existence of some fact, of which there was an entire absence of proof, the court has no authority to act, and, if it entertains jurisdiction under such circumstances, its acts are void and afford no justification to the attorney instituting the proceedings as against the party imprisoned thereby: Fischer v. Langbein, 103 N. Y. 84.

It may be stated in this connection that a party is bound by the acts of his attorney employed to set proceedings in action, and he is responsible for the methods resorted to by the attorney for the enforcement of a judgment obtained in his favor. Thus he is liable

for the unwarranted issuing by such attorney of an execution against the judgment debtor, and the unlawful arrest of the latter thereunder, although he had no knowledge of such illegal acts by his attorneys: Guilleaume v. Rowe, 94 N. Y. 268; 46 Am. Rep. 141; 63 How. Pr. 175. And the advice of counsel to client, under the influence of which a false imprisonment is procured by the client in good faith, is no justification for the illegal arrest and confinement, although evidence of it is admissible on the question of malice in mitigation of damages: Josselyn v. McAllister, 22 Mich. 300; Fire Assn. v. Fleming, 78 Ga. 733, 734.

Corporations are liable in actions for false imprisonment for the wrongful acts of their agents or servants resulting in the unlawful arrest and detention of a person: Owsley v. Montgomery etc. R. R. Co., 37 Ala. 560; American Exp. Co. v. Patterson, 73 Ind. 430; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350; 59 Am. Rep. 571. Thus a corporation is liable in damages if its agent, while engaged in the corporation's service of pursuing a criminal, illegally arrests another man, supposing him to be the fugitive from justice, although at the time of the arrest the agent is acting in disobedience of his orders: Harris v. Louisville etc. R. R. Co., 35 Fed. Rep. 116. If a passenger on a railroad has lost his ticket en route, and states such fact to the gatekeeper at his destination, but is forbidden by him to pass until he produces his ticket or pays his fare, and, upon his attempt to pass, is arrested by the police and confined in jail at the request of the gatekeeper, who is simply obeying orders, the company is liable for false imprisonment, on the ground that it has no right to issue an order under which a passenger can be detained and imprisoned until he produces his ticket or pays fare: Lynch v. Metropolitan etc. Ry. Co., 90 N. Y. 77; 43 Am. Rep. 141. To the same effect is Murdock v. Boston etc. R. R. Co., 133 Mass. 15; 43 Am. Rep. 480. But it seems that in such case the company would have the right to detain the passenger for a reasonable time on the spot for the purpose of investigating into the circumstances of the case: Standish v. Narragansett S. S. Co., 111 Mass. 512; 15 Am. Rep. 66.

In order to make a corporation liable in false imprisonment for the acts of its superintendent, it must appear that such acts were done within the scope and limits of his authority. Hence, it is not liable for an unlawful arrest ordered by its superintendent, unless his authority to issue such order is shown: Tolchester Beach Imp. Co. v. Steinmeier, 72 Md. 313. A person who deposits a counterfeit coin in the box on a car in payment of his fare, and, upon having his attention called to the fact by an employé of the car company, with a request to pay another fare in good money, refuses to make his fare good, and is arrested and detained in jail on a charge of passing counterfeit money, cannot on his discharge recover from the car company for a false imprisonment, as there was probable cause for his arrest and detention: Central Ry. Co. v. Brewer, 78 Md. 394. If a corporation calls a policeman and causes him to arrest a drunken man found on its premises, it cannot be held

liable in damages for the reason that the act of the policeman in making such arrest was lawful, and legally authorized: Pratt v. Brown, 80 Tex. 608.

Miscellaneous.—When a statute authorizes an arrest for the nonpayment of taxes, an arrest and imprisonment by a tax collector of a tax debtor for such nonpayment does not render him liable therefor in damages if he proceeds regularly under the statute: Rowe v. Friend, 90 Me. 241. But if the tax collector demands excessive fees of one under arrest for the nonpayment of his taxes, he abuses his authority and is liable in damages therefor: Robbins v. Swift, 86 Me. 197. The legislature of a state, or either house thereof, has the right to determine whether the acts of a person not a member are an obstruction to its proceedings, and having so determined, to cause him to be imprisoned for contempt. For such confinement, not excessive, he has no right of action against the members of the legislature voting upon the question, nor against the officer of the house executing the order: Canfield v. Gresham, 82 Tex. 10. If a person is arrested in one county, and, at his own request, committed to jail in another county, he waives the right to be imprisoned in the county where he was arrested, and also the right to recover for false imprisonment: Ellis v. Cleaveland, 54 Vt. 437. But an officer sued for false imprisonment cannot justify the arrest under a returnable process which has never been returned: Kent v. Miles, 65 Vt. 582; Ellis v. Cleaveland, 54 Vt. 437; Wright v. Marvin, 59 Vt. 439. An action for false imprisonment under a ca. sa. cannot be supported as long as the execution on its face remains unsatisfied: Wilkins v. Hall, 2 McCord, 205. But an execution, after the expiration of the time within which it was made returnable, is of no force, and an arrest and imprisonment thereunder is false as against the officer making it: Stoyel v. Lawrence, 3 Day, 1. A person claiming to be entitled to the possession of public land, but to which he has no title or right of possession, and of which a portion only is in his possession, is not justified, in attempting to remove an alleged trespasser from the latter portion, to resort to acts amounting to a violation of his personal liberty, and he is liable for damages therefor for a false imprisonment: People v. Wheeler, 73 Cal. 252. A defendant found guilty of a misdemeanor and adjudged to pay a fine, or remain in jail until such fine and costs are paid, cannot be compelled to pay the fine by manual labor on the streets, and if so compelled can maintain an action for damages for false imprisonment: Torbert v. Lynch, 67 Ind. 474. One making an arrest as an officer must, when sued for false imprisonment, prove his legal qualifications as such officer, or that he publicly acted and was recognized as such officer before or after the act brought in question: Short v. Symmes, 150 Mass. 298; 15 Am. St. Rep. 204, and cases cited.

TURNER *v.* FIDELITY & CASUALTY CO. OF NEW YORK.

[112 MICHIGAN, 425.]

INSURANCE—COMMENCEMENT OF SUIT—WAIVER OF LIMITATIONS.—A letter from an insurer to the insured, requesting that the matter of a claim under the policy be allowed to rest until the adjuster for the insurer can see the insured or his attorney, constitutes a waiver of a provision in the policy limiting the time for furnishing proofs of loss and beginning an action on the policy, and the insured does not lose his right of action by delay after receiving such letter, although nothing more is heard about the adjuster.

INSURANCE—ACCIDENT—TOTAL DISABILITY. — When the business of the insured consists in making loans on personal property, the fact that after receiving an injury he goes to his office every day for a short time without doing any work or business there, does not show, as matter of law, that he is not wholly disabled from prosecuting any and every kind of business pertaining to his occupation. This is a question for the jury to determine under all the facts in the case.

INSURANCE — AMBIGUOUS POLICY. — If language contained in a policy of insurance is ambiguous and susceptible of two constructions, any question arising out of such language must be resolved in favor of the insured.

Hanchett & Hanchett, for the appellant.

Beach & Gavit, for the appellee.

426 LONG, C. J. This is an action to recover a weekly indemnity under an accident policy issued by the defendant to the plaintiff on the eighth day of January, 1888, and subsequently renewed from year to year, the last renewal certificate covering a period from January 8, 1894, to January 8, 1895. On February 10, 1894, while the plaintiff was carrying wood on a wheelbarrow, he slipped and fell, dislocating his right shoulder. He claims an indemnity under the policy for a total disability for a period of ten weeks. At the time the policy was issued, and at the time of the accident, the plaintiff was engaged in the business of loaning money on personal security and real estate. He was insured as a banker and real estate dealer. He made two claims under this policy, the first one being made on March 12, 1894. Nothing was done in respect to this claim. Afterward, and on June 21, 1894, the plaintiff made a second statement of claim, which was forwarded to the company by Camp & Brooks, his attorneys. In regard to this letter, the defendant wrote the following letter, dated July 2, 1894: "Your favor of June 23d, inclosing claim blank regarding the above for an alleged injury stated to have been received February 10, duly to hand. I beg to say that we have already received a claim blank from Mr.

Turner for an alleged injury stated to have been received February 10th. We have already notified you that we fail to recognize any liability in that matter, and return the claim blank herewith. One of our adjusters will be in Saginaw shortly, and we will have him call upon you, and discuss this matter with you. We think he will be able to show you that there is a breach of warranty in Mr. Turner's application, and therefore no liability on the part of the company under the policy Mr. Turner holds. Kindly allow the matter to rest until our adjuster can see you, and oblige." Nothing more was done by either party until this suit was commenced, February 4, 1896.

The first assignment of error relates to the refusal of the court to direct a verdict for the defendant, on the ground that the suit was not commenced within one year [427] from the date of the injury. The policy provides that "unless affirmative proof of death or duration of disability is so furnished within seven months, and any legal proceedings for recovery hereunder is begun within one year from the time of such accident, all claims based thereon shall be forfeited to the company." The claim of plaintiff is, that the letter above quoted, written to Camp & Brooks, constitutes a waiver of this clause of the policy. On the other hand, it is contended that inasmuch as, during the time from the receipt of the letter to the commencement of suit, no adjuster of the company called upon plaintiff or his attorneys, and there was no communication of any kind between them on the subject of the adjustment of the claim, the plaintiff was not justified in waiting a year and a half before bringing suit; and, again, that the statement in the letter requesting him to let the matter rest would not warrant or justify the plaintiff in permitting the year to go by without bringing his suit if he desired to protect his rights; that the plaintiff might have been justified in waiting a reasonable time after receiving the letter before taking action, but not in waiting the time he did, as the letter held out no hope or promise of an adjustment, but merely asked that an opportunity might be given the company to explain why liability was denied.

This clause in the policy, however, was one which could be waived by the company. It cannot be construed as a limitation fixed by law. While the plaintiff was not bound to wait before bringing suit, yet it is apparent that he did wait at the request of the company. He testified that the reason he did not begin his action within the twelve months was because of the receipt of the letter of July 2d. Such clauses in policies of insurance, while

held valid as contracts, may be waived by the company. The law does not favor clauses of limitation in policies of insurance, and they are strictly construed, and it does not require the positive act of the company inducing postponement; but where the evidence is conflicting, [428] the question of waiver is one for the jury. We think, however, in this case, that there is no conflict in the evidence, and that the letter was positive in its terms, asking that the matter be allowed to rest until the adjuster of the company could see the plaintiff or his attorneys. As was said in Bonenfant v. American Fire Ins. Co., 76 Mich. 657: "Forfeiture is not favored either in law or equity, and a provision for it in a contract will be strictly construed; and courts will find a waiver of it upon slight evidence when the equity of the claim is, under the contract, in favor of the assured": See, also, Lyon v. Travelers' etc. Ins. Co., 55 Mich. 146; 54 Am. Rep. 354, and cases there cited: Peoria etc. Ins. Co.v. Hall, 12 Mich. 202; 2 May on Insurance, sec. 488; German Fire Ins. Co. v. Carrow, 21 Ill. App. 631; Thompson v. Phenix Ins. Co., 136 U. S. 287.

It is next contended that the plaintiff's own evidence and the evidence of his attending physician do not support the finding that he was totally disabled in the sense intended by the policy, and that the court should so have instructed the jury. The policy provides an indemnity of the sum of fifty dollars per week "against loss of time, not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable and prevent him from prosecuting any and every kind of business pertaining to his occupation above stated." Upon this point the plaintiff testified substantially that the fall entirely disabled his arm to the shoulder, and that it remained in that condition ten weeks; that his business consisted generally in personal security loans, and that during that time he did no business at all; that he could not dress himself without help, and that he had help during the whole time; that he did not do any work or business during that time, but had a man to do it for him; that he went to his office every day for a short time, but was unable to do any kind of work. We find nothing in the record which shows, or tends to [429] show, from the testimony of the plaintiff or his attending physician, that the plaintiff was not totally disabled from attending to and prosecuting any and every kind of business pertaining to his occupation. At least, it was a question for the jury to determine, and the court submitted it

in these words: "I think that a fair interpretation of that clause is, not that he must be so disabled as to prevent him from doing anything pertaining to the business, but that he must be wholly disabled, so as to prevent him from doing any and every kind of business pertaining to his occupation; not that he might do some one thing in regard to it, but that he must be wholly disabled, so as to prevent him from doing any and every kind of business pertaining to that occupation. I submit that to you as a question of fact to find whether he was so disabled, and for what length of time, under this policy."

In the case of Young v. Travelers' Ins. Co., 80 Me. 244, a policy in the exact language of this policy was considered. The court used this illustration: "Suppose a barber, who can use his razor and shears in his right hand only, but can use his left to wipe his customer's face, comb and dress his hair, and receive pay and make change, by an accident is wholly deprived of the use of his right hand, so that he can neither shave his customer nor cut his hair, can it be said that he is not wholly disabled from the prosecution of his business as a barber"?

It was held by that court that there is a difference between being able to perform any part of one's business and any and every kind of business pertaining to one's occupation.

If this language in the policy is ambiguous and susceptible of two constructions, then the question must be solved in favor of the insured; for it is well settled in this state that where a stipulation or exception to a policy, emanating from the insurer, is capable of two meanings, the one is to be adopted which is the most favorable to the insured; that it ought to be framed with such deliberate care that no form of expression by which, [430] on the one hand, the party insured can be caught, or by which, on the other, the company can be cheated, should be found on the face of it: Utter v. Travelers' Ins. Co., 65 Mich. 545; 8 Am. St. Rep. 913; Grand Rapids etc. Power Co. v. Fidelity etc. Co., 111 Mich. 148.

It is further contended that the attending physician having testified that, in treating this dislocation, he discovered that the plaintiff had sustained an injury at some time to that shoulder, which produced, as he called it, "traumatic rheumatism," and that a part of the pain was due to that, therefore the company should not be called upon to pay for an injury the inconvenience of which resulted partly and indirectly from disease or bodily infirmity previously existing. We think that question was fully and fairly submitted to the jury, and need not be discussed.

The judgment will be affirmed.

The other justices concurred.

INSURANCE—PROOFS OF LOSS—WAIVER.—A letter signed by the insurer, addressed and received by his agent in due course of correspondence upon the subject of the policy and loss in dispute, and in reply to a letter giving notice of such loss, when followed by a visit from the person named in the letter as one who would be sent on behalf of the insurer to attend to the loss, is admissible in evidence to show notice thereof and a waiver of further proofs: Roe v. Dwelling House Ins. Co., 149 Pa. St. 94; 34 Am. St. Rep. 595. See Graves v. Merchants' etc. Ins. Co., 82 Iowa, 637; 31 Am. St. Rep. 507, and note.

INSURANCE—ACCIDENT—TOTAL DISABILITY.—Under a policy insuring against loss of time effected by accidental injuries "wholly or continually disabling the insured from transacting any and every kind of business pertaining to his occupation," ability to occasionally perform some trivial and single act connected with some kind of business pertaining to his occupation does not render his disability partial instead of total, provided he is unable, substantially or to any material extent, to transact any kind of business pertaining to such occupation. The frequency and nature of the acts done are ordinarily for the consideration of the jury in determining whether he is totally disabled within the meaning of the policy: Lobdill v. Laboring Men's Mut. Aid Assn., 69 Minn. 14; 65 Am. St. Rep. 542, and note.

INSURANCE—CONSTRUCTION OF POLICY.—Where the meaning of a policy of insurance is doubtful, it should be construed most favorably to the insured: Matthews v. American Cent. Ins. Co., 154 N. Y. 449; 61 Am. St. Rep. 627, and note.

BARNARD *v.* BROWN.

[112 MICHIGAN, 452.]

VENDOR AND PURCHASER—CONTRACTS—MARKETABLE TITLE.—A purchaser of land under a contract requiring the vendor to execute and deliver a good and sufficient warranty deed, so as to convey the land in fee and unincumbered, is entitled to a good and marketable title merely, and is not entitled to a perfect record title.

VENDOR AND PURCHASER.—MARKETABLE TITLE to land is one of such character as assures to the purchaser the quiet and peaceable enjoyment of the property, free from incumbrance.

VENDOR AND PURCHASER.—TITLE BY ADVERSE POSSESSION is a marketable title.

VENDOR AND PURCHASER—MARKETABLE TITLE.—TITLE BY ADVERSE POSSESSION is sufficient to meet a contract for the sale of land assuring to the purchaser a title which is marketable and free from doubt, together with the quiet and peaceable enjoyment of the property.

W. H. Sweet and G. W. Davis, for the appellants.

Hanchett & Hanchett, for the appellee.

452 LONG, C. J. The plaintiff contracted in writing, May 26, 1890, that when the defendants should pay him the full sum

of five thousand four hundred dollars, he would execute and deliver to them a warranty deed, so as to convey to them, in fee, unencumbered, the title to the lots described in the contract. Defendants made payments thereon aggregating three thousand one hundred and ninety-six dollars and seventy-two cents. The balance of the moneys becoming due, plaintiff tendered a deed to the defendants, and demanded the balance of the contract price, which was refused, [453] whereupon plaintiff brought this action, and on the trial in the court below recovered damages. On the trial the plaintiff made a prima facie case by introducing the contract and showing the default of defendants in making the payments provided for therein, and a failure to pay the taxes, and that nothing further had been paid up to the time of suit, and that tender had been made of the deed, and a demand for payment of the balance due on the contract. Defendants then sought to prove that the record title of plaintiff was defective, and now insist that the title is defective. This question will be considered later.

It appeared that the plaintiff's title depended largely upon adverse possession for a continuous period of more than fifteen years. His father, Newell Barnard, was shown to have occupied the premises continuously from about 1870 down to the time of his death, which occurred July 9, 1883. He left no will, and the only members of his family were his son, Arthur, the plaintiff here, and his daughter, Lelia, both of whom were of age. It was shown that the plaintiff had been in possession in behalf of his father prior to his death, and that he continued in possession after his death for himself and for his sister until he acquired his sister's interest, and had continued in possession down to the time he made the contract with the defendants. The records of the probate court produced in evidence show that all the property of the estate which remained after the payment of the debts was assigned to Arthur and Lelia as sole heirs of Newell Barnard; that on February 16, 1885, Lelia conveyed her interest in this and in all real property in Michigan to her brother; that all this property, except a small part, was assessed to the Barnards, and from 1870 down to the time of the contract it was known as the "Barnard property." Testimony was also offered showing that the possession of Barnard was open, notorious, hostile, and continuous during all those years.

Defendants' contention was, that the burden of proof [454] was upon the plaintiff to show an absolute title, and that a title ob-

tained and held by adverse possession was not such a title as the contract called for. Defendants requested the court to charge upon that subject as follows: "The defendants, under the law and by their contract, are entitled to a good, marketable title to the land, and every part thereof; and the plaintiff, having only attempted to show a title claimed to have been acquired by adverse possession for a period of fifteen years—a title which can be determined or established only by judicial inquiry and decision, dependent wholly upon facts resting in parol—has not shown such a title as his contract called for, or such as the defendants are bound to accept; and plaintiff cannot recover."

The court below, while acceding to the fact that the defendants were entitled to a good and marketable title, said to the jury: "A marketable title is one of such character as to assure to the vendee a peaceable enjoyment of the property. If you find that the plaintiff and his father were in actual, visible, continuous, notorious, distinct, and adverse possession of the property sold to the defendants for a period of fifteen years and more prior to the time that the contract was made with the defendants, the plaintiff would be the absolute owner of the property. If you should find that these elements have been complied with, and that he has been in possession continuously by himself and his ancestors, he is the absolute owner of the property as much as though he had record title, and could convey such title as the defendants had a right to receive under this contract."

The court was not in error in this charge. The contract provides that: "Forthwith, after the full payment of the purchase money, interest, and taxes, and performance of this agreement by the second parties, the said party of the first part shall execute, or cause to be executed and delivered, to the parties of the second part a good and sufficient warranty deed of said land, so as to convey the same in fee, and unencumbered, to said parties of the second part," et cetera.

455 By this contract the plaintiff was not to convey a title which was perfect upon the record, but was bound to convey a title in fee and unencumbered, and therefore defendants were entitled to a marketable title. A marketable title, however, is one of such character as should assure to the vendee the quiet and peaceable enjoyment of the property, and one which is free from encumbrance. We think it is well settled that when such a title as that is obtained by adverse possession, it is sufficient to meet the requirements of such a contract as this. In O'Connor v. Huggins, 113 N. Y. 521, after describing the features of

adverse possession shown by the plaintiff, the court said: "There is no proof nor pretense of any other title to the property lying either in grant or in claim; nor does anything appear to disturb the conclusiveness of the presumption of a valid grant which arises from an exclusive and uninterrupted possession of the property, under a claim of title founded on a conveyance, for a period extending far beyond the length of time mentioned in the statute of limitations. Such a presumption will always displace objections based on flaws in the proceedings in which the title has had its source, and protect the title from being injured or affected by their disclosure."

In Foreman v. Wolf (Md., June 21, 1894), 79 Md. xiii, the supreme court of Maryland say: "It appears from the record that the appellee has been in the exclusive possession of the property in dispute for over twenty years, and, even if the objection urged by the appellant was tenable, the title of the appellee would be a good and marketable one by adverse possession, under the statute of limitations. It is well settled that a title by adverse possession for over twenty years, where the only persons who could claim were all under no disability, is marketable, and such as a court of equity will compel a purchaser to take."

In Tewksbury v. Howard, 138 Ind. 110, it was claimed that a title obtained by adverse possession is not a marketable one. In answer to this, it was said by the court: "The principal argument is, that the decree quieting title came too late to support this suit, but incidentally it [436] is said that a title by adverse possession is not a marketable title. If a marketable title, it is manifest that the decree so alleged was only in confirmation of the title so held, and the tardiness in procuring it would not defeat the action. Title by adverse possession is as high as any known to the law. A marketable title cannot be said to be more."

In the recent case of Elder v. McClaskey, 17 C. C. A. 251, 70 Fed. Rep. 529, was involved a title by adverse possession under the Ohio statute. Of that Mr. Justice Taft said: "Under the construction put upon this statute by the supreme court of Ohio, an open, notorious, exclusive, and adverse possession of land for twenty-one years, with or without color of title, whether continuous in the first possessor or tolled in persons claiming under him, and whether with or without knowledge of the existence of a better title, confers upon the original possessor, or those claiming under him, an indefeasible title in fee": Citing Paine v. Skinner, 8 Ohio, 159, and several other Ohio cases.

It is well settled in Michigan that title by adverse possession

need not be based upon color of title: Campau v. Lafferty, 50 Mich. 114; Sanscrainte v. Torongo, 87 Mich. 69. That a title acquired by adverse possession is sufficient to meet a contract of such character as should assure to the vendee a quiet and peaceable enjoyment of the property, and one which is free from doubt, is also settled in Bicknell v. Comstock, 113 U. S. 149; Leffingwell v. Warren, 2 Black, 599; Murray v. Harway, 56 N. Y. 337; Shriver v. Shriver, 86 N. Y. 575; Ballou v. Sherwood, 32 Neb. 666; Schall v. Williams Valley R. R. Co., 35 Pa. St. 191; Moore v. Luce, 29 Pa. St. 260; 72 Am. Dec. 629; Hodges v. Eddy, 41 Vt. 485; 98 Am. Dec. 612; Crowell v. Druley, 19 Ill. App. 509; Ottinger v. Strasburger, 33 Hun, 466; Simson v. Eckstein, 22 Cal. 580; Clancey v. Houdlette, 39 Me. 451; Walker v. Ray, 111 Ill. 315; De Long v. Mulcher, 47 Iowa, 445; Thacker v. Booth (Ky., Jan. 24, 1888), 6 S. W. Rep. 460; Lurman v. Hubner, 75 Md. 268; Ford v. Schlosser, 13 Misc. Rep. 205; 34 N. Y. Supp. 12; 1 Am. & Eng. Ency. of Law, 2d ed., 883, and cases cited; [457] Dupont v. Starring, 42 Mich. 492; Bunce v. Bidwell, 43 Mich. 542.

It is contended, further, that the plaintiff promised to furnish an abstract of title, and that the contract implies that a perfect record title was to be given. The contract contains nothing on the subject of an abstract, or the kind of title to be given. We have already recited what the conveyance was to be, and, in order to fulfill the conditions of the contract, it was not necessary that a perfect record title should be conveyed.

Some other questions are raised by this record, which we do not deem important to discuss. They are fully answered in the brief of counsel for plaintiff, and, inasmuch as there was a full and fair trial of the questions raised, and the court below having stated the law correctly upon those questions, we think it will not benefit counsel or parties to enter upon a discussion of them.

The judgment must be affirmed.

The other justices concurred.

VENDOR AND PURCHASER—MARKETABLE TITLE—COVENANT TO CONVEY.—A covenant in a contract for the sale of land that the property is "to be free from all liens and encumbrances," and the purchase money is "to be refunded if title should not prove good on examination of records, or cannot be made good," is equivalent to a covenant to convey a good marketable title: Herman v. Somers, 158 Pa. St. 424; 38 Am. St. Rep. 851, and note.

VENDOR AND PURCHASER—MARKETABLE TITLE.—A marketable title in equity is one in which there is no doubt involved either as a matter of law or fact. If there is color of title outstanding which may prove substantial, though there is not enough in evi-

dence to enable the chancellor to say so, a purchaser is not compelled to take it and encounter the hazard of litigation: Note to Simon v. Vandeveer, 63 Am. St. Rep. 688. See Moore v. Williams, 115 N. Y. 586; 12 Am. St. Rep. 844; Vought v. Williams, 120 N. Y. 253; 17 Am. St. Rep. 634; Gregory v. Christian, 42 Minn. 304; 18 Am. St. Rep. 507.

REID, MURDOCK & COMPANY *v.* FERRIS.

[112 MICHIGAN, 693.]

ACTIONS.—IF FRAUDULENT PURCHASES are made at different times, each purchase constitutes a distinct and separate act of fraud, for which the seller may maintain a separate action.

RES JUDICATA.—RECOVERY IN REPLEVIN for a portion of goods fraudulently purchased and in the buyer's possession at the time of the issuance of the writ does not bar an action of trover for the remainder of the goods, not in such possession and not taken under the writ of replevin.

REPLEVIN—POSSESSION.—In replevin, no recovery can be had for goods not in the possession of the defendant at the time the writ issues, except when such goods have been fraudulently disposed of, or concealed to avoid the writ.

REPLEVIN—POSSESSION.—No recovery can be had in replevin for property known by plaintiff to be out of the defendant's possession, or out of existence at the time of the issuance of the writ.

Bundy & Travis, for the appellant.

Drury & Strong, for the appellee.

693 LONG, C. J. Plaintiff was a wholesale grocery house in Chicago, and defendant a retail grocer in Grand Rapids. This was an action of trover, brought to recover the value of about twelve hundred dollars' worth of goods sold by plaintiff to defendant between October 30, 1894, and January 9, 1895. The goods were sold at different times during that period, and on different terms of credit, some of the invoices being on sixty days' time, and others on thirty days' time; the amount of the largest sale being two hundred and thirty-eight dollars and seventy cents, and the smallest one four dollars. The plaintiff claimed, and introduced evidence tending to show that the purchases were fraudulent.

694 In its declaration the plaintiff set up that, on discovering the fraud, it replevied from the defendant a part of the goods shipped in the last two invoices; that the replevin case was commenced in justice's court, and appealed to the circuit, and there tried on the merits, and resulted in a judgment in favor of plaintiff for the goods replevied and nominal damages of six cents; that the goods replevied came out of the two invoices of

December 28, 1894, for two hundred and nine dollars and seventy-five cents, and January 9, 1895, for seventy-eight dollars and seventy-five cents; that the value of the goods replevied was eighty-one dollars and fifty cents; that the defendant, at the time the replevin suit was instituted, was not in possession of the other goods included in said two invoices, he having sold or otherwise disposed of the same. And plaintiff averred that this judgment in such replevin suit constituted a binding prior adjudication between plaintiff and defendant that said two purchases were fraudulent. The defendant, in his amended plea, also set up the bringing of said suit of replevin, and the recovery therein of a part of the goods contained in said two sales, one of December 28, 1894, and the other of January 9, 1895, and averred that, because of the recovering of said judgment in replevin, the plaintiff was not entitled to maintain this action of trover. On the trial of this cause, the plaintiff showed the proceedings in said replevin suit, and gave evidence tending to show that the goods replevied were all the goods that then remained in the possession of defendant at the time the replevin suit was instituted. At the conclusion of plaintiff's evidence, defendant's counsel moved the court to instruct the jury to render a verdict in favor of defendant, for the reason that the plaintiff could not split its cause of action, and that the judgment in replevin was a bar to the present action, which motion was granted by the court. To this ruling the plaintiff excepted, and the question thereby raised is the sole and only question involved on this record.

The court below was in error. As well stated by counsel for plaintiff: "The effect of defendant's position here [695] is, not that a single cause of action cannot be split up, but that separate causes of action in tort must be combined." The sales were separate and distinct and on different terms of credit. Plaintiff could have elected to rescind some of them, or treat them as void, and ratify others, and sue in tort for some and in contract for the others: Lee v. Burnham, 82 Wis. 209; Stickel v. Steel, 41 Mich. 350. In the latter case it appeared that S. bought a bill of goods in August, with credit for four months from September 15th following, and on the same day, from the same person, another bill of goods, at a credit of four months from October 1st following. It was held that the two bills of goods did not constitute one demand when one became the subject of suit before the other became due, or when the remedy for one was barred before the time expired for the other. In the present case, the torts consisted of the fraudulent purchases, and were committed

when the purchases were made and the goods obtained, and not when their fraudulent character was discovered. Each purchase was a distinct and several act of fraud, for which the plaintiff was entitled to maintain a separate action. This doctrine is fully enunciated in Lee v. Kendall, 56 Hun, 610, and Shook v. Lyon, 16 Daly, 420; 11 N. Y. Supp. 720.

It appears, however, that the plaintiff replevied a part of the goods shipped in the last two invoices. It is therefore contended by defendant that, that suit having gone to trial on the merits, the plaintiff could not maintain trover for the balance of those particular invoices. But it appears that the goods for which trover was brought were not in the possession of the defendant at the time the writ of replevin was issued and served, he having sold or disposed of them. The rule is well settled that in replevin no recovery can be had for goods not in possession of the defendant at the time the writ issues, except where the goods have been fraudulently disposed of or concealed to avoid the writ. In Sexton v. McDowd, [696] 38 Mich. 152, the court, speaking of the nature and office of the writ of replevin, said: "The form and nature of the remedy suppose a case where the defendant unlawfully detains the property from the plaintiff, and not a case where the defendant cannot surrender, nor the plaintiff accept, possession; and it requires that, before the writ shall be executed, an affidavit shall be attached, showing, among other things, that the plaintiff is entitled to the possession of the property, and that the defendant, not a stranger, unlawfully detains it."

In Hinchman v. Doak, 48 Mich. 168, the court said: "When the defendant established the fact that he was not in possession when suit was instituted, he showed that he was entitled to have the case dismissed out of court, and to recover his costs."

The following cases are in line with this proposition: Aber v. Bratton, 60 Mich. 357; Burt v. Burt, 41 Mich. 82; Morrison v. Lumbard, 48 Mich. 548; Bacon v. Davis, 30 Mich. 157; Gildas v. Crosby, 61 Mich. 413. The same rule is stated in other states: Williams v. Morgan, 50 Wis. 548; Coffin v. Gephart, 18 Iowa, 256.

It must follow that, under the circumstances of this case, the plaintiff is not estopped from bringing suit in trover for such property as was not taken under the writ of replevin. In Farwell v. Myers, 59 Mich. 183, Mr. Justice Morse recognized that very doctrine, though holding that assumpsit would not lie for the balance of the goods not taken under the writ. In Farwell v. Myers, 64 Mich. 234, the same case was in this court, only in

different form. In the second case, claim was based upon the conversion of the property, and it was held that the action would lie. We do not understand that the court intended to hold in McBrian v. Morrison, 55 Mich. 351, that a recovery could be had in replevin for property known by plaintiff to be out of defendant's possession, or out of existence, when the writ was sued out. The opinion was by Mr. Justice Campbell, who also wrote the last case of Farwell v. Myers, 64 Mich. 234, [697] where the action of trover was permitted to be maintained for the balance of the property not taken under the writ.

The judgment must be reversed and a new trial ordered.

The other justices concurred.

REPLEVIN—PARTIES DEFENDANT—RECOVERY OF PART OF GOODS.—Replevin cannot be maintained against a person who has no possession or control of the goods to be replevied: Richardson v. Reed, 4 Gray, 441; 64 Am. Dec. 77, and note. It seems that where a portion of chattels cannot be replevied because the defendants have destroyed, concealed, or sold such portion, the plaintiff may replevy that part of the property that can be found, and maintain a separate action to recover the value of that which had been thus severed: Bennett v. Hood, 1 Allen, 47; 79 Am. Dec. 705, and note.

SALES—REMEDY FOR FRAUD OF BUYER.—Trespass, replevin, or trover may be sustained by a vendor whose goods have been obtained from him by a fraudulent purchase: Cary v. Hotailing, 1 Hill, 311; 37 Am. Dec. 323, and note. See monographic notes to Thurston v. Blanchard, 33 Am. Dec. 702-711, and Cottrill v. Krum, 18 Am. St. Rep. 555-563.

PATTERSON *v.* COLLIER.

[113 MICHIGAN, 12.]

LIMITATION OF ACTIONS—ACCOMMODATION NOTE OF STOCKHOLDERS OF CORPORATION—PAYMENT BY COMPANY.—A joint note executed by the individual stockholders of a corporation, for its accommodation, is not taken out of the statute of limitations by a payment made by the company, where there is nothing to show that the makers intended to give the company authority to extend the note beyond the statutory period. Such an intention is not shown by the fact that all parties knew the note to be accommodation paper, that payments made by the company were made on its own behalf, upon an obligation which it was morally bound to pay, and that the makers wished and expected it to pay.

Assumpsit by Patterson and another against Collier, Pomeroy, and others, upon a promissory note. The court directed a verdict against Pomeroy but in favor of all the other defendants, and the plaintiffs appealed from the judgment thereon.

Aug. C. Baldwin and Edward J. Bissell, for the appellants.

John H. Patterson, Charles F. Collier, and Clarence Tinker, for the appellees.

[12] HOOKER, J. The defendants were stockholders in a corporation known as the Holly Vinegar & Preserving [13] Company, defendant Pomeroy being president, and defendant Wilson being secretary, of the concern. In June, 1884, this corporation needed some money, and a conference was had by these defendants with one Seeley, who refused to loan it upon the credit of the company, but consented to furnish it upon the paper of the stockholders; and on June 21st these defendants made their joint note, payable to Daniel Seeley or bearer, for one thousand dollars, payable in one year, with interest at eight per cent, and obtained one thousand dollars, which was paid over to the vinegar works. Two or three payments were made upon this note by the Holly Vinegar & Preserving Company, one of them being made by or through defendant Pomeroy, against whom the plaintiffs were allowed to recover. It is, perhaps, inferable that these payments were made with the knowledge of the defendants, and that it was the arrangement, made when the money was borrowed, that the company should pay the note. The defense interposed is the statute of limitations, and the only question is, whether the case is taken out of the statute by these payments.

Counsel for plaintiffs contend that the Holly Vinegar & Preserving Company was made the agent of the defendants to pay this note, and, therefore, that the payments were made on their behalf and by their consent. On the other hand, the defendants insist that the payments were not made for them, or upon their behalf, or by the use of their funds. It is manifest that all parties knew that this was accommodation paper, and that payments made by the vinegar company were made on its own behalf, upon an obligation that it was morally bound to pay, and that the defendants wished and expected it to pay. There is nothing in this that ought to be construed into authority to pledge the defendants' credit. If the case is taken out of the statute by such payment, it is by reason of a technical application of the doctrine of agency. Had the vinegar company signed the note with the defendants, such payment would not have had such effect, under our statute and the decisions [14] of this court: 2 Howell's Statutes, sec. 8730. The actual relation of the parties was substantially the same as though the Vinegar Company

had joined in the note. There is nothing in the case that shows that the defendants intended to give the company authority to extend this note beyond the statutory period, and we think the case is within the rule of the case of Home Life Ins. Co. v. Elwell, 111 Mich. 689, and cases there cited.

The judgment of the circuit court is affirmed.

Long, C. J., and Grant and Montgomery, JJ., concurred.

Moore, J., did not sit.

STATUTE OF LIMITATIONS.—A PAYMENT BY AN UNAUTHORIZED PERSON does not affect the rights of a debtor under the statute of limitations: See monographic note to Maddox v. Duncan, 65 Am. St. Rep. 684, on the relation of agency existing between persons jointly liable, showing, at page 688, according to some of the authorities, that one joint debtor has no authority to deprive his codebtors of the benefit of the statute of limitations by his own promise or admission made without their consent.

CLARK *v.* MICHIGAN CENTRAL RAILROAD COMPANY.

[113 MICHIGAN, 24.]

RAILWAYS—LIABILITY FOR INJURY TO TRESPASSERS OR LICENSEES.—One who goes upon the private grounds of another under a mere license from the latter does so subject to the attendant risks. Hence, if a trespasser, or even licensee, in passing over a railroad track, on the unfenced grounds of the company, is tripped by a semaphore wire and hurt, the company is not answerable for the injury.

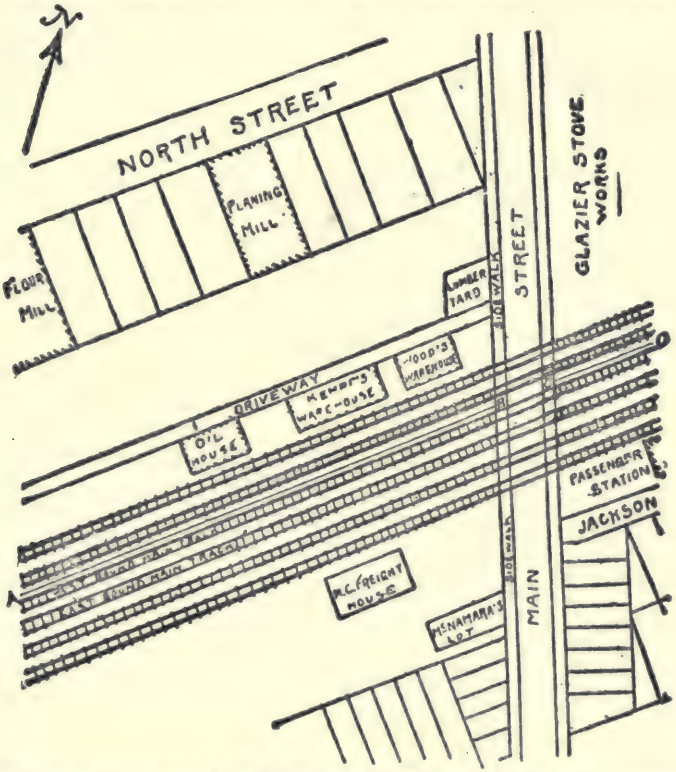
Case by Clark against the defendant company for personal injuries. The court directed a verdict for the defendant, and the plaintiff appealed from the judgment rendered thereon.

Lehman Brothers, for the appellant.

John F. Lawrence, for the appellee.

[24] HOOKER, J. Main street, in the village of Chelsea, runs north and south, and crosses the defendant's six tracks at an angle of about twenty-five degrees. The freight and passenger houses are south of the tracks, the former being a few rods west, and the latter about the same distance east, of Main street. On the north side of the railroad tracks is a driveway extending from Main street westerly, parallel with the tracks, between which and the tracks are three buildings. The first is Wood's warehouse, [25] and is situated but a few feet from Main street; next is Kempf's warehouse, which stands farther west, but in close proximity to Wood's warehouse; and a little farther west is a building called an "oil-house." The driveway gives access to all of those buildings upon the north, and the track is close to

them upon the south. There is a sidewalk on the west side of Main street. The first street to the north of the tracks is North street, which is parallel with the track, and it is apparent that persons living upon that street west of Main street find the distance to the business portion of the town shorter by going in a direct line across the tracks than by taking the highway running northeast to Main street, and then south; and, the station grounds being unfenced, people are in the habit of walking upon and across them at will. There is no evidence indicating an in-



vitation or license unless it be found in the fact that the defendant has taken no steps to prevent it. The accompanying diagram will aid in understanding the situation. The line A-B (C-D, between the second and third tracks (counting from the north), represents a wire which is used to operate, from the station, a semaphore, some distance off. This wire is raised some eight or ten inches from the ground, being supported at short intervals upon rollers or pulleys, and is drawn taut. Witnesses differ about the size of the wire, stating it to be from one-eighth

inch to the size of the finger. One says it is a twisted wire; others that there were two wires. On the occasion of the injury, the plaintiff started from Kempf's warehouse, where he had delivered some poultry, to go to Kempf's bank to get a check for the chickens. Instead of going by the highway with his son, who drove the team, he took a more direct route across the tracks, thinking to save a little time, and was tripped by the wire, and hurt his elbow. The circuit court directed a verdict for the defendant, and the plaintiff has appealed.

Counsel for the plaintiff make the claim that the common practice of crossing the unfenced grounds of the defendant [26] at this point for over twenty years had established a public easement, but they cite no authority which sustains the contention. In our opinion, the evidence does not create a suspicion of the existence of an easement. There is nothing that indicates a license even, unless it is to be inferred from the fact that the defendant did not care to contest the right of every person whose convenience might lead him to cross the premises. Technically, such people were trespassers; but it is not to the discredit of the defendant that it did not resort to violence or litigation to stop a practice that did it no harm. Whether these persons were trespassers or naked and gratuitous licensees (which last we do not mean to intimate) is unimportant. [27] In neither case had they the right to expect the defendant to forego a reasonable use of its land, in which respect it stood on the same plane as a private person. Such persons may have rights of action where a wanton injury is done them; or where caused by unlawful acts, and, under some circumstances, in the running of trains, as in the following cases cited by counsel: Barry v. New York Cent. etc. R. R. Co., 92 N. Y. 289; 44 Am. Rep. 377; Byrne v. New York Cent. etc. R. R. Co., 104 N. Y. 362; 58 Am. Rep. 512; Taylor v. Delaware etc. Canal Co., 113 Pa. St. 162; 57 Am. Rep. 446; Nichols v. Washington etc. R. R. Co., 83 Va. 99; 5 Am. St. Rep. 257; Swift v. Staten Island etc. R. R. Co., 123 N. Y. 645; Hooker v. Chicago etc. Ry. Co., 76 Wis. 542; Roth v. Union Depot Co., 13 Wash. 525. See, also, Green v. Chicago etc. Ry. Co., 110 Mich. 648. It is the general rule that one who enters the private grounds of another at the mere license of the latter does so subject to the attendant risks: See Schmidt v. Bauer, 80 Cal. 565. With the latter report of this case will be found a note citing many cases in support of the doctrine: And see 1 Thompson on Negligence, 303, and Kinney v. Onsted, 113 Mich. 96; post, p. 455. In our own state are two cases which clearly forbid a recovery: Sturgis v. Detroit etc. Ry. Co., 72 Mich. 619;

O'Neil v. Duluth etc. Ry. Co., 101 Mich. 437. In the light of these cases, the defendant was entirely without fault.

The judgment is affirmed.

The other justices concurred.

RAILWAY—LIABILITY FOR INJURY TO TRESPASSERS OR LICENSEES.—The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, or those who go upon them, uninvited, for their own convenience: Peters v. Bowman, 115 Cal. 345; 56 Am. St. Rep. 106, and note. A railway company, which merely permits a person to come upon its premises for his own interest, convenience, or gratification, and not upon any business connected with the company, owes him no duty other than that of not willfully or wantonly injuring him, for he is a mere licensee, who accepts the license subject to its attendant risks and perils: Note to Pomponio v. New York etc. R. R. Co., 50 Am. St. Rep. 133.

EARLY v. STANDARD LIFE AND ACCIDENT INSURANCE COMPANY.

[113 MICHIGAN, 58.]

INSURANCE—ACCIDENT—DEATH BY POISON.—An insurance company, exempt, under an accident policy, from liability in case of death by poison, is not answerable for a death caused by poison accidentally administered. To defeat a claim under the policy it is not necessary that the poison should have been taken with intent to produce death.

DEFINITIONS—POISON.—Aqua ammonia is a poison.

Assumpsit by Welthy A. Early against the Standard Life & Accident Insurance Company on a policy of insurance. The court directed a verdict for the defendant, and the plaintiff appealed from the judgment rendered thereon.

George H. Prentis, for the appellant.

Keena & Lightner, for the appellee.

58 LONG, C. J. This action is upon a policy of insurance upon the life of Michael Early, the husband of the plaintiff. The policy was made payable to the plaintiff in case of the death of the insured. It is undisputed that the policy was to be in force from October 18, 1892, to October 18, 1893. It appears that on August 29, 1893, Michael Early, feeling slightly unwell, went into a drugstore in Detroit, and asked the proprietor to give him something to relieve the pain, and the proprietor, by mistake, gave him some aqua ammonia. It burned his mouth very severely, but he lived from that time to September 13, 1893 (some fifteen days), when he died from the effects of the potion taken. Due proofs of death were made, and the defendant refused payment on the ground that the death was caused by

means specially excepted in the policy. It [59] was the contention of the plaintiff that death was caused by shock, and not by the poisonous substance. The court directed a verdict in favor of the defendant. Plaintiff brings error.

Counsel for plaintiff bases his contention upon the testimony of Dr. John J. Mulheron, who was called as a witness for plaintiff. He testified substantially that on August 29th he was called to attend the insured. He was asked:

"Q. What was his condition? A. I examined him, and found him suffering from a shock, and in a very weak condition of the pulse. On examining his mouth, I found that he had taken into it some irritant poison. His throat and mouth showed the effects of something of that nature. The irritation had extended to his lips, and they were also irritated. It was a burn such as would be caused by aqua ammonia, and the shock was what we would naturally expect from an irritant poison of that nature.

"Q. On the 13th of September, I think, he died? A. It was about that date.

"Q. From the effects of this shock? A. Yes; indirectly.

"Q. What, in your judgment, had he taken? A. Aqua ammonia.

"Q. In sufficient quantities to cause that trouble? A. Yes, sir."

To state the contention of counsel for plaintiff more specifically, it is that Mr. Early did not die from poison (that is, he was not poisoned), but died from the effects of the shock; that his whole nervous system was affected by the shock which he received when he found he had taken something he should not have taken, and that it was this that caused his death some time thereafter; that the aqua ammonia burned, and this produced the shock; that aqua ammonia is not what is considered by unprofessional persons as a poison; that his death was due to an accident, and not to poison.

The policy provides insurance "against the effect of injuries to the body caused by external, violent, and accidental [60] means, within the meaning of this policy, its agreements and conditions printed herein or on the back hereof." On the back of the policy it is provided that the policy is accepted subject to the following conditions:

"This insurance does not cover disablement occasioned directly or indirectly by any natural illness, bodily infirmity, disease, or disorder, unless it can be proved to be the direct result of an accidental injury sustained after this policy shall have

taken effect, nor injuries of which there is no visible mark upon the body, nor death nor injury resulting wholly or partly, directly or indirectly, from any of the following acts, causes, or conditions, or when affected by any such act, cause, or condition, or under its influence. From any of the following causes: Intoxication, ... poison, contact with poisonous substances," et cetera.

It is admitted on the part of the defendant that Mr. Early's death was caused by an accident (that is, that the taking of the aqua ammonia was accidental); and it is claimed, therefore, that the case is clearly within the exception to the policy which excludes from its terms death caused by accidental means resulting wholly or partly, directly or indirectly, from poison. It is further contended by counsel for defendant that the policy excepts death due to poison, without reference to how the poison causes the death, and without reference to any motive in the taking of it, or whether it is taken intentionally, voluntarily, or whether it is taken by oneself or administered by another person.

There can be no question, under the testimony in this case, that aqua ammonia is a poison. Dr. Mulheron expressly states it to be. The deceased, then, came to his death, in our opinion, by poison. It was accidentally administered, supposing it to be another substance. This could not take the case out of the exception, but rather brings it within the exception. The great weight of authority is in favor of the proposition that it is not necessary that the poison be taken with intent to produce death, in order to defeat a claim flowing from the right of membership.

[61] In Cole v. Accident Ins. Co. (Q. B. Div., May 10, 1889), 61 L. T., N. S., 227, the policy insured against injuries caused by accidental, external, and visible means, and provided that "this insurance shall not extend to death by suicide, ... or to any injury or death arising from disease, ... or by poison," et cetera. It appeared that the insured, by accident, drank a poisonous mixture or liquid in mistake for medicine which he was in the habit of taking, and shortly afterward died from the effects. Verdict was directed for the defendant. On motion for a new trial, Mr. Justice Mathew, speaking for the court, said: "It is true that the policy in this case was intended to provide against accidental injury, but we must not treat that as all that the policy contains. The terms of the provisos must be given their due effect."

After reciting the proviso above quoted, the learned justice said: "This is a clear and intelligible phrase. We are asked to

insert after the word poison, 'unless accidentally taken or intentionally administered to the assured.' The only case of death from poison which would then be left in which the company would not be liable is that in which the assured intentionally took poison; but that is covered by the proviso as to suicide." It was held that the accident came within the proviso.

In Pollock v. United States Mut. Acc. Assn., 102 Pa. St. 230, 48 Am. Rep. 204, the policy insured against injuries effected through external, violent, and accidental means, provided that it should not extend to any bodily injury of which there should be no external and visible sign, or to any bodily injury caused directly or indirectly by the taking of poison. The insured, being present in a store where a salesman was offering for sale a sample of birch oil, and mistaking it for milk of birch, first tasted, then took a drink of, it, from the poisonous effects of which he died within twenty-four hours. It was admitted, in a case stated, that the deceased mistook the birch oil for milk of birch, which he had been in the habit of drinking; it being a [62] harmless beverage, which closely resembled, in color, smell, and taste, birch oil. In an action by the beneficiary to recover the sum insured, it was held that the terms of the policy did not extend to that cause of death, and the judgment below was not disturbed.

In Hill v. Hartford etc. Ins. Co., 22 Hun, 187, the policy in suit was almost in the exact form as in the present case; but the words used in the exception read, "by the taking of poison," while the exception in the present one is "by poison" (that is, any death caused by poison). There it was held that the provision excepting from insurance a death caused "by the taking of poison" was not limited to cases of intentional self-poisoning, but included all cases in which the death was so caused: Cooke on Life Insurance, sec. 56, lays down the same rule.

In Batchelor v. Accident Assn., reported in 34 Weekly Law Bulletin, page 239, published at Cincinnati, Ohio, the policy was in the exact form as in Hill v. Hartford etc. Ins. Co., 22 Hun, 187. The insured died from an overdose of morphine. The case in the circuit court was ruled for the defendant, and on appeal to the supreme court the judgment was affirmed.

In Paul v. Travelers' Ins. Co., 112 N. Y. 472, 8 Am. St. Rep. 758, the court said: "If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake."

We have not overlooked the cases of Healey v. Mutual Acc. Assn., 133 Ill. 556, 23 Am. St. Rep. 637; Mutual Acc. Assn. v. Tuggle, 39 Ill. App. 509; and Travelers' Ins. Co. v. Dunlap, 160 Ill. 642; 52 Am. St. Rep. 355. But in the present case the expression is, "death by poison." We know of no case which goes to the extent of holding that such an expression in the exception contained in the policy does not avoid it.

63 The court below properly held that no recovery could be had in the case.

The judgment is affirmed.

The other justices concurred.

INSURANCE—ACCIDENT POLICY—DEATH BY POISON.—It has been held that there can be no recovery, under an accident policy, exempting the company from liability in case of death by poison, where the insured took poison by mistake: Note to Metropolitan Acc. Assn. v. Froiland, 52 Am. St. Rep. 363, discussing the subject; but the better view seems to be that the words "taking poison" mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning. Hence, the company is liable for the death of one who, by mistake, drinks carbolic acid for peppermint, which he wishes to take for some ailment, and dies from the effects of the poison: Travelers' Ins. Co. v. Dunlap, 160 Ill. 642; 52 Am. St. Rep. 355.

PEOPLE v. SNOWBERGER.

[113 MICHIGAN, 86.]

ADULTERATION OF FOOD—GUILTY KNOWLEDGE.—It is competent for the legislature, in the exercise of its police power, to prohibit, under a penalty, the sale of adulterated articles of food or drink, although the salesman may have no knowledge of their adulteration. One making such sales must do so at his peril.

CRIMINAL LAW—SALE OF ADULTERATED FOOD—GUILTY KNOWLEDGE OR INTENT.—If a statute prohibits the sale of an adulterated article of food, such as mustard, and defines adulteration, proof of guilty knowledge or intent is not essential, in a prosecution thereunder, to the conviction of one who sells such article.

Conviction for selling adulterated food in violation of the statute mentioned in the opinion. Section 8 of that act read as follows: "No person shall knowingly offer, sell, or expose for sale, in any package, cheese which is falsely branded or labeled."

William Look, Ira G. Humphrey, and Bowen, Douglas and Whiting, for the appellant.

Willis Baldwin, prosecuting attorney, for the people.

86 LONG, C. J. Respondent was convicted under an information charging that: "On the nineteenth day of April, A. D.

1897, at the city of Monroe, and in the county aforesaid, Michael Snowberger did offer for sale, and sell, to Carl Franke, an adulterated article of food, to wit, a quantity of mustard, to wit, a quarter of a pound, colored and adulterated with tumeric, [87] whereby the said mustard, as an article of food, was damaged, and its inferiority concealed, and whereby it was made to appear of better and of greater value than it really was, the same not being a mixture or compound recognized as ordinary articles or ingredients of articles of food, contrary to the form of the statute in such case made and provided," et cetera.

The information was filed under act No. 193, Public Acts 1895, entitled, "An act to prohibit and prevent adulteration, fraud, and deception in the manufacture and sale of articles of food and drink." The act provides:

"Section 1. No person shall, within this state, manufacture for sale, offer for sale, or sell any article of food which is adulterated, within the meaning of this act."

"Sec. 2. The term 'food,' as used herein, shall include all articles used for food or drink, or intended to be eaten or drunk by man, whether simple, mixed, or compound."

"Sec. 3. An article shall be deemed to be adulterated, within the meaning of this act: 1. If any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength, or purity; 2. If any inferior or cheaper substance or substances have been substituted wholly or in part for it; 3. If any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it; 4. If it is sold under the name of another article; 5. If it consists wholly or in part of a diseased, decomposed, putrid, infected, tainted, or rotten animal or vegetable substance or article, whether manufactured or not, or in case of milk, if it is the product of a diseased animal; 6. If it is colored, coated, polished, or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; 7. If it contains an added substance or ingredient which is poisonous or injurious to health; provided, that the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, and are not injurious to health."

Section 19 makes any violation of the act a misdemeanor, and provides a penalty by a fine of not less than [88] one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail, et cetera.

On the trial, respondent admitted that on the nineteenth day of April, 1897, he, at the city of Monroe, this state, offered for sale, and did sell, to Carl Franke, a quantity of mustard, to wit, a quarter of a pound, which was afterward found upon a chemical examination to be colored and adulterated with tumeric, whereby the said mustard, as an article of food, was damaged, and its inferiority concealed, and it was thereby made to appear of greater and better value than it really was; the same not being a mixture or compound recognized as an ordinary article or ingredient of articles of food. But he claimed that said article of mustard so sold was purchased by him as a pure article in good faith, and that he believed at the time of the purchase by him, and also at the time of the sale to the said Franke, that the same was pure mustard, free from any coloring and adulteration with tumeric or any other coloring or adulterant, and that no inferiority was concealed whereby it was made to appear of greater or better value than it really was; that, at the time he purchased the same, he asked for pure mustard, and that the same was warranted to him as pure; that he did not make or cause to have made a chemical examination of the same, and did not inform himself or endeavor to ascertain the methods of determining pure from impure mustards, but relied upon the representations of his vendor and the appearance of the article to the eye; and that he did not intend to violate the law. From such conviction, respondent appeals.

It is the contention of counsel for respondent that it was the intent of the legislature to provide by the act that no person should be convicted and punished for selling adulterated food or drink without showing that he knew the same to be adulterated; that the information does not charge such knowledge, and the proofs disclose that respondent acted in good faith, and in the belief that the article sold was pure and unadulterated. The act cannot so be so construed. The offense under the act consists in selling an article intended to be eaten or drunk which is adulterated. Section 8 of the act shows conclusively that the legislature did not intend to make criminal intent or guilty knowledge a necessary ingredient of the offense. As a rule there can be no crime without a criminal intent; but this rule is not universal. In People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, the respondent was convicted of the offense, under the statute, of keeping his saloon open on Sunday. It was there said: "It is contended that, to constitute an offense under the section referred to (1 Howell's Statutes, sec. 2274), there must be some

evidence tending to show an intent on the part of the respondent to violate it. The section under which Roby is prosecuted makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon closed. As a rule, there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."

Many cases are cited in that case where convictions were sustained although the element of guilty knowledge was lacking. Thus, in Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating: Commonwealth v. Boynton, 2 Allen, 160; and of the offense of selling adulterated milk, though ignorant of its adulteration: Commonwealth v. Farren, 9 Allen, 489; Commonwealth v. Nichols, 10 Allen, 199; Commonwealth v. Waite, 11 Allen, 264; 87 Am. Dec. 711; Commonwealth v. Smith, 103 Mass. 444. In Missouri, a [90] magistrate may be liable to the penalty for performing the marriage ceremony for minors without consent of parents or guardians, though he may suppose them to be of the proper age: Beckham v. Nacke, 56 Mo. 546. Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age: Commonwealth v. Raymond, 97 Mass. 567. In People v. Welch, 71 Mich. 548, this court, in speaking of People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, said: "When a statute does not make intent an element of the offense, but commands an act to be done or omitted which, in the absence of the statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation": Citing State v. Hartfiel, 24 Wis. 60.

In the late case in this court of Wolcott v. Judge, 112 Mich. 311, the relator, as prosecuting attorney of the county, filed an information against one Fred Saunders, charging him with being engaged in selling liquor without giving the bond required by the statute. The bond was fair upon its face, but one of the sureties, it appears, was disqualified, under section 2283d1 of

3 Howell's Statutes. The information did not allege that respondent had knowledge of this defect in the bond. The information was quashed by the court below, and the relator asked the aid of mandamus to compel the respondent to reinstate the case. It was said by this court in the majority opinion: "It was the intention of the legislature to make the execution and delivery of the prescribed bond a condition precedent to sale, and to require the person desiring to engage in the business mentioned to assume the responsibility of knowing that the bond, when presented, complies in all essential particulars with the law. He must know that his sureties are males; that they are resident freeholders of the township, village, or city in which the business is to be carried on; that they hold none of the offices prohibited by the act; and that, at the time the bond is filed, neither is a surety upon more than two bonds required by the act."

[91] It appeared that one of the sureties was already upon more than two bonds, and the writ was granted, compelling the respondent to reinstate the case. The case of People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, was cited in that case in support of the proposition that intent was not an ingredient of the offense.

These regulations are under the police power of the state. Undoubtedly, it was competent for the legislature to prohibit the sale of adulterated articles of food and drink. The police power of the state extends to the protection of the health, as well as of the lives and property, of the citizens. Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of the citizen or interferes with his liberty, it is for the courts to determine whether it relates to and is appropriate to promote such public health. Under the police power, the conduct of individuals and the use of property may be regulated, so as to interfere to some extent with the freedom of the one and the enjoyment of the other. It cannot be doubted that the legislature intended by this act to protect the public against the harmful consequences of sales of adulterated food, and, to the end that its purpose might not be defeated, to require the seller, at his peril, to know that the article which he offers for sale is not adulterated. As was said by the supreme court of Ohio in State v. Kelly, 54 Ohio St. 166: "If this statute had imposed upon the state the burden of proving his knowledge of its adulteration, it would thereby have defeated its declared purpose."

In State v. Smith, 10 R. I. 260, the court, in speaking of the offense of selling adulterated milk, said: "Counsel for defendant asked the court to charge that there must be evidence of a guilty intent on the part of the defendant, and of a guilty knowledge, in order to convict him. Our statute, in that provision of it under which this indictment was found, does not essentially differ [92] from the statute of Massachusetts; and there, previous to the enactment of our statute, the supreme court had determined that a person might be convicted although he had no knowledge of the adulteration, the intent of the legislature being that the seller of milk should take upon himself the risk of knowing that the article he offers for sale is not adulterated."

Statutes in many states have been passed providing that whoever sells, or keeps or offers for sale, adulterated milk, or milk to which water or other foreign substance has been added, shall be punished, et cetera. Under these statutes, it has been decided many times that the risk is upon the seller of knowing that the article he offers for sale is not adulterated, and that it is not necessary in an indictment under such a statute to allege or prove criminal intent or guilty knowledge: Commonwealth v. Smith, 103 Mass. 444; Commonwealth v. Warren, 160 Mass. 533; People v. Cipperly, 101 N. Y. 634. The same rule that no criminal intent is necessary has been held to apply under an act forbidding the sale of oleomargarine or other imitations of dairy products unless express notice be given to the purchaser: Bayles v. Newton, 50 N. J. L. 549; Commonwealth v. Gray, 150 Mass. 327. The English rule is in keeping with the doctrine in this country on this subject: Roberts v. Egerton, L. R. 9 Q. B. 494.

The statute not requiring knowledge on the part of the seller to make the offense complete, we are satisfied that the conviction must be sustained. No case has been cited, and we are not able to find one, where a contrary doctrine is laid down. The act may work hardship in many cases, but that question is one to be addressed to the legislature, and not to the courts. As we have said, it was within the power of the legislature to pass the act making it an offense punishable with fine and imprisonment to sell adulterated food or drink, although the person selling the same has no knowledge that it is adulterated. Under this statute, one making sales must do so at his peril.

The conviction is affirmed.

Montgomery, Hooker, and Moore, JJ., concurred.

Grant, J., did not sit.

ADULTERATION OF FOOD—SALE OF—POLICE POWER.—The legislature has power to forbid the sale of impure or adulterated food or milk: State v. Dupaquier, 46 La. Ann. 577; 49 Am. St. Rep. 334.

CRIMINAL LAW—SALE OF ADULTERATED FOOD—GUILTY KNOWLEDGE OR INTENT.—One who does a thing forbidden by statute is liable to the punishment imposed by it, though, in doing the act, he has no evil intent, unless the statute makes such intent an element of the crime: State v. Zichfeld, 23 Nev. 304; 62 Am. St. Rep. 800; Haggerty v. St. Louis Ice etc. Co.., 143 Mo. 238; 65 Am. St. Rep. 647. One may be convicted of selling adulterated milk, although he did not know it to be adulterated: See extended note to Farrell v. State, 30 Am. Rep. 619, discussing a want of guilty knowledge as a defense in such cases.

KINNEY *v.* ONSTED.

[113 MICHIGAN, 96.]

ELEVATORS, GRAIN—DANGEROUS PREMISES—USE OF RAILING NOT CONTEMPLATED.—If a customer goes to a grain elevator to buy a load of corn of the proprietor, and, while there, puts a defective railing around the opening, on an elevated platform, to a use other than that for which it was intended, by leaning against it for support, the proprietor is not answerable for an injury to his customer, occasioned by the giving way of the railing, while being so used, although he had previous knowledge of its defective condition.

Case by George B. Daniels against Onsted for personal injuries. There was a judgment for the plaintiff and the defendant appealed. Pending the appeal, the plaintiff died, and the cause was revived in the name of his administrator, Frank D. Kinney.

Salsbury & O'Mealey, for the appellant.

Watts, Bean & Smith, for the appellee.

[96] MONTGOMERY, J. This action was instituted by George B. Daniels in his lifetime, to recover damages sustained by reason of the alleged defective condition of the defendant's premises. The material facts in the [97] case, as disclosed by the evidence, are that the defendant was the proprietor of a grain elevator, which consisted of a building twenty-two feet wide and forty feet in length. On the south side of this building there is a bridge twelve feet in width, with an approach leading up to it at either end, of the same width. A pair of rolling doors, seven and one-half feet wide, open from about the center of the building on to this bridge or elevated platform. One means of approach to the office, which is in the elevator building, is to follow the driveway up to the platform, and across it, through these doors. Near the edge of this platform is a railing fastened to posts spiked to the sills of the bridge or platform. The posts are four by four, with two by six pieces spiked lengthways on top.

The railing is three feet high. In front of the rolling doors a space of ten feet wide is left, where there is no railing, having been left out to facilitate the loading of heavy articles into farmers' wagons. The portion of the railing east of this opening is twenty feet long before the grade portion of the bridge is reached. On the west of the opening there is a railing ten feet long, on the level part of the bridge, and another railing on the west grade, eight feet in length. Farmers, in delivering grain to the elevator, drove on to the bridge, and, by means of a spout attached to the wagon, ran the grain into the hopper.

The testimony tends to show that, a few days prior to the injury to the plaintiff, there had been a runaway, and the railing had been damaged, the top piece being torn off from the posts, and the posts also weakened; that the railing had been straightened up in such a manner that its appearance did not indicate its weakness to the casual observer. The plaintiff, on the day in question, started to go to the elevator to buy a load of corn of the defendant. He went on to the bridge from the west approach, well to the south side of the platform, and was passing in a northeasterly direction, to go through the rolling doors into the elevator building. If he had kept on in that direction, [98] it would have brought him on the inside of the elevator, where his business with the proprietor was to be transacted; but it appears that at this time his son, Willis Daniels, and William Knapp, were on the bridge, unloading a load of wheat, and his son called to him, saying that he had some money for him. At that, plaintiff turned southeast, came up to the south side of the wagon, near the center, a distance of fifteen or sixteen feet, where his son was, and got the money. After he got it, he was talking with these two men a few minutes about the horses, and, while so talking, leaned against the railing, and it gave way, and he fell to the ground, and was injured. Upon this state of facts, the plaintiff recovered, and the defendant brings error, and contends that there is no case shown by the plaintiff's testimony entitling him to recover, and that the defendant was under no obligation to build a railing, or keep it in repair, for the plaintiff to lounge or sit upon or lean against. The plaintiff, on the other hand, contends that the case falls within the rule that where a party, expressly or by implication, invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and, to that end, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.

This case is certainly near the dividing line. The rule is well

settled that the owner or occupant of land is liable to those coming to it at his invitation, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land or the access to it, which is known to him and not to them, and which he has negligently suffered to exist. But this duty, it is held, does not extend so far as to make such an occupant responsible for the unsafe condition of those parts of his premises not intended for the reception of visitors or customers, and where they are not expected to go: See 1 Thompson on Negligence, 308. Applying these rules to this case, it is clear that, if the plaintiff [99] had suffered an injury from a defect in the floorway of the platform or bridge, or, possibly, if, by misadventure, he had stumbled and fallen against this defective railing, there would be ground for holding that the defendant was responsible for the injury. But the weakness of the plaintiff's case is, that the defendant never invited him to enter upon his premises, and put the railing to the test of supporting his weight, by leaning or lounging against it.

The only case in which a similar question has arisen, which have been called to our attention, are those of Stickney v. Salem, 3 Allen, 374, and Orcutt v. Kittery Point Bridge Co., 53 Me. 500. In Stickney v. Salem, 3 Allen, 374, the action was against the city for injuries resulting to deceased caused by leaning against a fence or railing which marked the terminus of a street, and was built upon the top of a seawall. The deceased, in company with a friend, had walked to this point to view the sea, had turned his back to and leaned against this railing, which gave way, because of defects, and he received serious injuries. The court say: "The fact that the railing was defective, and would have proved an insufficient barrier in case it became necessary for a traveler to use it for a legitimate object, is wholly immaterial. It is a sufficient answer to the plaintiff's case that the defendants were not bound to keep the railing in repair for the purpose for which it was used by the deceased at the time of the accident."

The case of Orcutt v. Kittery Point Bridge Co., 53 Me. 500, is precisely analogous to that of Stickney v. Salem, 3 Allen, 374.

It is urged by plaintiff's counsel that a distinction exists between private premises and a public highway in this regard, and that the rule of care required of the highway authorities is based upon a different principle from that of private parties inviting persons upon their premises. We think, however, that this distinction cannot avail the plaintiff in this case. The invitation to the plaintiff was to do business in the elevator. The approach

to the place of business was an elevated private way. It could not be [100] expected any more by this defendant than by the city authorities of Salem in the case cited that this private way would be put to any other than the uses to which it was apparently adapted. Undoubtedly, in the case of a municipality or an individual maintaining a way, an injury resulting from a defect in the way itself, to one who stops to transact business, may be recovered for. But the weakness of the plaintiff's case arises from the fact that this railing was put to a use for which it was not intended, any more, in the present case, than were the railings in the cases cited from Massachusetts and Maine. Plaintiff's counsel concede that the defendant was under no obligation to build or keep the railing in repair for plaintiff to lounge or sit upon or lean against, but they contend that the defendant's liability arises out of his knowingly permitting a snare or trap, by leaving the railing in apparent good order, but in fact so defective that one was liable to receive injury from it. But, before it could become a snare or trap, it must be assumed that its apparent good condition was an invitation to make such a use of it as the plaintiff attempted. As we have seen, its presence was not an invitation to make that use of it.

We think there was no case for the jury, and that the judgment should be reversed, and no new trial ordered.

The other justices concurred.

ELEVATORS, FREIGHT — NEGLIGENCE — DANGEROUS PREMISES—OWNER'S LIABILITY.—A mere licensee who is injured through the negligence of the owner of a freight elevator in failing to have it properly guarded, has no right of action: Gibson v. Leonard, 143 Ill. 182; 36 Am. St. Rep. 376; for a mere naked license or permission to enter premises, whether implied by law or given by the owner or occupant, does not impose upon the latter any obligation to provide against the dangers of accident to such licensee: Plummer v. Dill, 156 Mass. 426; 32 Am. St. Rep. 463; note to Southern etc. Assn. v. Dawson, 56 Am. St. Rep. 810. Compare Olson v. Schultz, 67 Minn. 494; 64 Am. St. Rep. 437, showing when a landlord is answerable for an injury caused by a freight elevator's being out of repair, although he had no knowledge of such defect.

HOFFMAN *v.* BAY CIRCUIT JUDGE.

[113 MICHIGAN, 109.]

PROCESS—EXEMPTION OF ATTORNEYS FROM SERVICE OF.—An attorney at law is privileged from the service of process, such as a summons, while attending upon the supreme court, or while going thereto from the county of his residence, or returning therefrom to the same place.

PROCESS—EXEMPTION OF ATTORNEYS FROM SERVICE OF.—A STATUTE exempting an attorney at law from arrest on civil process during a sitting of court does not deprive him of his common-law privilege of exemption from service of process while attending court, or while going to, or returning therefrom.

Mandamus to compel the judge to dismiss a suit against the relator for want of proper service.

C. R. Brown, for the relator.

C. L. Collins, for the respondent.

[109] MONTGOMERY, J. Relator is an attorney at law, and at the October term of this court appeared and argued a cause in this court, and, while on his return to his home at St. Ignace, was served with a summons at the suit of John Godkin, a party to the case pending in this court. He moved to dismiss the proceeding on the ground that he was privileged from the service of process while attending upon the court, and while going to and returning from the court to the county of his residence. The circuit judge denied the motion, and the question is before us for review on mandamus.

The only statute of this state bearing upon the subject is section 7253 of 2 Howell's Statutes, which reads: "All officers of the several courts of record shall be liable to arrest, and may be held to bail, in the same manner as other persons, except during the actual sitting of [110] any court of which they are officers, and, when sued with any other person, such officers shall be liable to arrest, and may be held to bail, as any other persons, during the sitting of the court of which they are officers; but no attorney, solicitor or counselor shall be exempt from arrest during the sitting of the court of which he is an officer, unless he shall be employed in some cause pending and then to be heard in such court."

It is said by respondent's counsel that this statute should be held to exclude all other privilege, and that this only relates to arrest on civil process, and does not apply to the service of summons. We think the statute should not be so construed, but that if, at the common law, the attorney was privileged from the service of process while attending upon court, that privilege has not been removed by the statute in question.

In 2 Taylor on Evidence, sec. 1330, the common-law rule is stated: "In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the

course of the judicial proceeding, but, in common with parties, barristers, solicitors, and, in short, all persons who have that relation to a suit which calls for their attendance, they are protected from arrest upon any civil process, while going to the place of trial, while attending there for the purposes of the cause, and while returning home."

In the case of Mitchell v. Huron Circuit Judge, 53 Mich. 541, it was held by this court that, as to parties, the privilege extends to the service of summons as well as to suit commenced by arrest. It was said that "public policy, the due administration of justice, and protection to parties and witnesses alike demand it." In Cofrode v. Wayne Circuit Judge, 79 Mich. 332, 349, Mr. Justice Campbell, referring to Jacobson v. Wayne Circuit Judge, 76 Mich. 234, said: "It has been settled that service cannot be made within the original county on any one who is there as a witness, or on any other legal errand which exempts him from process while away from his residence." [111] In Matthews v. Tufts, 87 N. Y. 568, the defendant attended a meeting of creditors of a bankrupt, for the purpose of proving claims in his own behalf and in behalf of others whom he represented. The court, after reviewing the authorities, say: "The plaintiff claims that the defendant was not attending as a witness, but only as a creditor. Conceding that the defendant was in attendance only as a party, and as attorney of other parties, we think he was privileged from service of process or summons while so attending." It was further said: "This immunity does not depend upon statutory provisions, but is deemed necessary to the due administration of justice." In Central Trust Co. v. Milwaukee Street Ry. Co., 74 Fed. Rep. 442, a subpoena was served upon a nonresident attorney while attending upon the court in another county. Upon a review of the authorities, the court held that this was a violation of privilege. In Sherman v. Gundlach, 37 Minn. 118, it was said: "The same reasons for exempting a nonresident witness from arrest exists in favor of exempting him from the service of a summons in a civil action." In Massey v. Colville, 45 N. J. L. 119, 46 Am. Rep. 754, it was said: "The foundation of the rule is the impolicy of permitting an act which will deter suitors or witnesses from attending courts." This consideration applies with equal force to an attorney: See, also, Gilbert v. Vanderpool, 15 Johns. 242; Van Alstyne v. Dearborn, 2 Wend. 586; Hurst's case, 4 Dall. 387; Lyell v. Goodwin, 4 McLean, 39.

The writ will be granted.

The other justices concurred.

EXEMPTION FROM SERVICE OF PROCESS.—The privilege of parties and witnesses from arrest on civil process, while attending court, extends to the service of a summons, as well as to arrest: Cameron v. Roberts, 87 Wis. 291; 41 Am. St. Rep. 43; and a statute prohibiting the arrest, in civil actions, of parties attending court as witnesses or jurors, is not an implied repeal of the common law exemption: Cooper v. Wyman, 122 N. C. 784, 787; 65 Am. St. Rep. 731, 732.

MASON *v.* WIERENGO.

[113 MICHIGAN, 151.]

LANDLORD AND TENANT—HOLDING OVER—RENEWAL OF LEASE.—If a tenant for a term of years holds over, the landlord has a right to treat his act as a renewal of the lease for another year, although shortly before the expiration of the lease, and after the work of removal is begun, with an intention to vacate, the tenant becomes seriously sick and dies before such work is finished.

LANDLORD AND TENANT—HOLDING OVER.—THE ACT OF GOD does not excuse a lessee from the performance of his express contract to yield possession at the expiration of his lease.

LANDLORD AND TENANT—HOLDING OVER—INTENTION OF LESSEE.—The right of a landlord, in a lease for a term of years, to treat a holding over as a renewal of the lease for a year, is not affected by the intention of the tenant, and the latter cannot, therefore, defend against a claim for rent by showing that he had no intention of renewing his lease.

Mason presented a claim for rent against the estate of Wierengo, deceased, which was disallowed, and the claimant appealed to the circuit court. That court directed a verdict for part of the amount, and, from the judgment rendered thereon, the claimant appealed.

Arthur Jones, for the appellant.

Bunker & Carpenter, for the appellee.

152 HOOKER, J. The plaintiff, being owner of a building, leased the same for a term of years, at an annual rental, to Wierengo, who occupied it as a store. A short time before the expiration of the lease, Wierengo rented another building, and informed the plaintiff that he should vacate the building owned by him at the expiration of the lease. Preparation for removal began September 19th, and actual removal began before September 26th. Counsel for the defendant claim that the lease expired October 1st, at midnight. On September 26th, after the removal began, Wierengo was taken sick. The work of removal was continued by his clerks, but was not finished until October 11th. Mr. Wierengo died on the 6th of October. Under these circumstances, counsel for the defense assert that the presump-

tion of a renting for another year is rebutted. They also contend that it was made impossible for Wierengo to vacate, by the act of God.

If it is contended that the act of God excuses one from the performance of his express contract to yield possession at the expiration of his lease, we are unable to acquiesce in the contention. It is only in those contracts which the act of God renders impossible of performance—as where the subject matter of the contract dies, or is destroyed, or where personal labor is contracted for, and the person dies or becomes incapacitated through the act of God—that a party is excused from performance: See Beach on Contracts, sec. 217, where this question is discussed, and 1 Am. & Eng. Ency. of Law, 2d ed., 588-592, where a large list of authorities confirm this doctrine. If, therefore, the sickness of Mr. Wierengo has any bearing upon the case, it is as a circumstance bearing upon the question of the rebuttal of the presumption.

Counsel urge strenuously that the presumption of an intention to renew the lease for a year arising from holding over is not conclusive, but that it may be rebutted. As a matter of fact, undoubtedly it may; but it is not so clear that it would constitute a defense against the claim of a landlord who should acquiesce, and elect to treat the [153] holding over as a renewal of the lease for a year, rather than as a trespass. In the absence of qualifying circumstances implying consent to a holding under some new arrangement, the holding over is a legal trespass, and does not depend upon the intention of the tenant. It is a wrongful holding, whatever the cause, though perhaps not culpable in a moral sense, and the rights of the landlord are definitely fixed by the law. This question was reviewed in Campau v. Michell, 103 Mich. 623, and the opinion of the court as there indicated was contrary to the defendant's position in this case. That case was exceptional, in that the defendant's tenant was induced to hold over by the mistake or misconduct of the plaintiff's agent, and the doctrine of estoppel was applied: See, also, Bradley v. Slater, 50 Neb. 682.

We think that there is uniformity in the decisions against the contention that the intention to vacate as soon as possible can affect the right of the landlord to elect to treat the holding over as a renewal of the lease for a year. It requires some express or implied consent upon his part to a holding over upon other conditions. This is wanting here. Counsel urge the hardship of the application of the rule in this case, but we cannot

say that there is or is not hardship, or that we would be justified in imposing a burden upon the plaintiff to relieve the defendant from a legal obligation. He appears to have tried to rent the place, and has given defendant credit for what he has been able to derive from the building. Had Wierengo lived, he might have made the same claim if asked to pay the rent for another year, but it would not have relieved him. The situation, as it is, only differs in the degree of inconvenience, intensified as it is by the death of Wierengo, and the change in his affairs naturally resulting. It is unfortunate for his representatives that the store was not vacated, but we discover no legal reason for lifting the burden of misfortune from them, and imposing it upon another, who is in no way responsible for it.

The judgment is reversed, and a new trial ordered.

The other justices concurred.

LANDLORD AND TENANT.—A HOLDING OVER by a tenant entitles the landlord to treat him either as a trespasser or a tenant for another year. The option to so regard it is with the landlord, and not with the tenant. The latter holds over at his peril, although he notified the landlord that he did not wish to renew his lease, and holds over for a couple of days by reason of difficulty in procuring trucks and of the illness of a boarder: Haynes v. Aldrich, 133 N. Y. 287; 28 Am. St. Rep. 636.

CONTRACTS.—THE ACT OF GOD, or extreme difficulty, is no excuse for the nonperformance of a covenant or contract wherein there is no exception of such act or difficulty: Superintendent v. Bennett, 27 N. J. L. 513; 72 Am. Dec. 373; Tompkins v. Dudley, 25 N. Y. 272; 82 Am. Dec. 349; School Dist. v. Dauchy, 25 Conn. 530; 68 Am. Dec. 371.

OAKLAND COUNTY SAVINGS BANK *v.* STATE BANK OF CARSON CITY.

[113 MICHIGAN, 284.]

BANKS AND BANKING—INDEBTEDNESS—TRANSFER OF STOCK—PRIORITY OF BANK'S LIEN.—The lien of a bank, on stock certificates issued by it, for an indebtedness due the bank by the owner of the stock, matured and unpaid, has priority over any lien of a third person, acquired by a bona fide transfer of the stock to him.

BANKS AND BANKING—INDEBTEDNESS—TRANSFER OF STOCK—ESTOPPEL TO ASSERT PRIORITY OF BANK'S LIEN.—Notwithstanding a statute which provides that no transfer of stock upon the books of a bank can be made except by consent of the directors, where the owner of the stock is indebted to the bank on matured paper, the bank is estopped from asserting a lien on stock, for such an indebtedness, where its cashier declares to the transferee, at the time of the transfer, that the bank has no lien on the stock, and the transferee takes it, relying upon such statement.

ESTOPPEL—DECLARATION OF BANK'S CASHIER.—A bank may speak through its cashier as its agent, and is estopped to deny the truthfulness of a statement made by him that the bank has no lien on certain stock, if the transferee of such stock is without knowledge of an indebtedness which the owner of the stock owes to the bank.

Bill by the Oakland County Savings Bank against the State Bank of Carson City to compel a transfer of stock upon the books of the defendant bank. The complainant appealed from a decree dismissing the bill.

Fedewa & Walbridge, for the complainant.

Fitzgerald & Barry, George H. Cagwin, and Francis A. Stace, for the defendant.

285 MONTGOMERY, J. Complainant, on the 23d of March, 1893, extended a credit to Samuel S. Walker, a stockholder in the defendant corporation, upon his promissory note of three thousand dollars, and took as collateral three certificates, each representing one thousand dollars' worth of stock in the defendant bank. Subsequently, one thousand dollars of the principal was paid, and one of the certificates of stock surrendered. This bill is filed, after a refusal by the defendant bank to recognize the complainant's ownership in the stock, and to transfer the same upon the books of the bank, to compel such transfer.

After receiving the certificates, and on the next day, the complainant's cashier wrote to the cashier of the defendant, saying: "We have taken thirty shares of stock of your bank, represented by certificates 83, 84, and 85, issued to Samuel S. Walker, as collateral security to a loan. Please advise us if you have any lien on said stock." To which the defendant's cashier replied: "Your favor of the 24th to hand, in relation to bank stock. In reply, would say I do not hold any lien on said stock. Yours truly, E. C. Cummings, Cashier."

At the time of the transfer of the stock by Walker to the complainant, Mr. Walker stated to the cashier of complainant that he was not indebted to the defendant bank. It now appears that at the time this letter of Cummings was written to the cashier, and at the time of the loan, Walker was indebted to the defendant bank, and under the statute a lien existed in favor of the defendant bank upon the stock. At the time the loan was procured, Mr. Walker was financially responsible, and it is reasonably clear that, if the defendant's cashier had informed the complainant of the true situation, the complainant would

have been able to secure its claim. Walker has since become insolvent.

Two contentions are made on behalf of complainant: [286] 1. That complainant, in the first instance, as transferee of the stock, is entitled to priority over the defendant bank, as a bona fide purchaser of such stock; 2. That, if this be not true, still the defendant has, by the letter of its cashier, estopped itself from asserting a lien upon the stock entitled to priority over complainant.

The first question is ruled against the complainant's contention by Michigan Trust Co. v. State Bank, 111 Mich. 306, and Citizens' State Bank v. Kalamazoo Co. Bank, 111 Mich. 313. We think, however, that the defendant should be held estopped from asserting the priority of its lien upon this stock. The defendant's contention is that under section 3208a8 of 3 Howell's Statutes, a transfer of the stock upon the books of the bank can be made only by the consent of the directors, in a case where the owner of the stock is indebted to the bank on matured paper at the time of the attempted transfer, and that the assignee takes the stock subject to this right. From this it is contended that, as the transfer of the stock subject to such a lien can only be made with the consent of the board of directors, it necessarily follows that the bank can only estop itself through the action of the board of directors. We think this contention cannot be maintained. Undoubtedly, as to one having knowledge of the fact of an indebtedness owing by the owner of the stock to the bank, the cashier would be without authority to waive the bank's lien. But that is not this case. It is the common practice for cashiers to have control of the books of the bank, and to conduct its correspondence. It cannot be doubted that the purchaser of stock not encumbered by a lien in favor of the bank might have it transferred upon the bank's books without the consent of the board of directors; and the estoppel in this case arises out of the failure of the proper officer, who is custodian of the books of the bank and of its bill receivable, to truthfully answer a question relating to facts peculiarly within his knowledge.

The case of Cochecho Nat. Bank v. Haskell, 51 N. H. [287] 116, 12 Am. Rep. 68, is instructive upon this question. Two questions were presented in that case: One was whether the cashier of the bank had power to discharge a debtor of the bank without payment, or to bind the bank by an agreement that a surety should not be called upon to pay a note he had signed, or that

he should have no further trouble from it; and second, whether the bank could be estopped by his declaration that the note was paid. It was held, as to the first question, that it could not be inferred that the power to discharge an obligation due to the bank without payment, or to make such an agreement with a surety as that suggested, was within the scope of the cashier's authority; but the court say: "It would be otherwise, we think, as to his declaration that the note was paid. It is his duty to receive payment, and to keep the account of it, and he is the proper person to apply to, to ascertain whether a note has been paid or not. It would, indeed, be peculiarly within the scope of the business confided to him, to give such information."

So here the complainant addressed the custodian of the books and of the bills receivable of the bank for information, and, when the cashier spoke in response to this request for information, the bank spoke, and should be held estopped from now asserting the facts to be otherwise than as stated to complainant in response to its inquiry: See, also, Merchants' Bank v. State Bank, 10 Wall. 604. To assert that the law says that the cashier may not permit the transfer of stock of the bank while the lien exists upon it, that it follows from this that he cannot deprive the bank of a lien, and that, therefore, every one is bound to know that, if the bank is to be estopped by anyone, it is the directors, is to describe in sections the circumference of the same circle. The question is not what steps should be taken by the purchaser of stock with knowledge that it is subject to a lien in favor of the bank, but the question is, What are proper steps to be taken to ascertain whether such a lien exists? If one may not do this by correspondence with the bank, or with the officer of the bank universally [288] recognized as representing the bank in its correspondence, there would seem to be an end to legitimate transactions in stock of corporations. The fault in this assertion lies in a failure to recognize that, preliminary to the question of whether there shall be a transfer, preliminary to the purchase of the stock, common prudence suggests that the purchaser may inquire in the usual channels for the purpose of ascertaining whether the stock is subject to a lien. If such an inquiry be directed to the party who conducts the correspondence of the bank, it is bare assertion to say that, because he has not the power under the law to compel the board to consent to the transfer of the stock, he cannot, through a simple lie, estop the bank. The point is, that in the correspondence upon the subject, the bank speaks through the cashier. It is the

bank that speaks, itself, by an assertion which it makes by a perfectly proper and competent agency in that behalf.

The decree should be reversed, and a decree entered in this court for complainant.

Long, C. J., and Moore, J., concurred with Montgomery, J.

HOOKER, J., dissented.—In the principal case, it was considered to be the duty of the defendant's cashier, during the correspondence between the cashiers of the two banks, to have informed the complainant of Walker's indebtedness, which he did not do, and, for this reason, the defendant was held to be estopped from asserting, against the complainant, the priority of its lien upon the stock in question, but the learned justice dissented from the proposition that the defendant should be so estopped by the statement of its cashier, when applied to by the complainant for information, that the bank had no lien. "Section 3208a8, of Howell's Annotated Statutes, justifies a bank," he said, "in refusing to transfer stock during the time that the owner is indebted to the bank upon matured paper, and assignees of the stock take it subject to this right. Furthermore, the act expressly prohibits the transfer of such stock upon the books at such a time without the consent of the board of directors. It is said that the cashier is the officer of whom a person proposing to buy stock would naturally inquire to ascertain whether or not the bank had a lien upon it, and that the purchaser would have a right to rely upon his statements, and that the bank could not afterward question them by reason of an estoppel. The statute apparently attempts to secure the bank and its depositors against loss through its shareholders by providing a lien upon the stock for sums due to the bank from its stockholders. It makes a transfer by a registered stockholder, at a time when he owes an overdue claim, invalid as against the bank, and prohibits a change in the registered ownership, except by the consent of the board of directors. If anyone can estop the bank, it is the board, not the cashier, whom the law deprives of all power to transfer the stock without consent of the directors, where the effect of the transfer is to cut off a lien."

BANKS—LIEN ON SHARES—PRIORITY.—A statute giving a corporation a lien on stock for a debt due the company is valid; and, if a lien on stock is given by statute for indebtedness to the corporation, owing by a stockholder, a transfer of the stock to a person ignorant of the lien does not discharge it, nor authorize the purchaser to demand and receive a transfer of it so discharged: Note to Victor G. Bloede Co. v. Bloede, 57 Am. St. Rep. 394, showing to what extent transfers of stock, in banking, as well as other corporations, may be restricted. An assignee of stock in a bank, the transfer to whom has not been entered upon its books, has a mere equity which must yield to any superior equity or lien of the bank: Jennings v. Bank of California, 79 Cal. 323; 12 Am. St. Rep. 145.

BANKS—CASHIER—ESTOPPEL.—The cashier of a bank is its agent, and his declarations and admissions, within the scope of his

ordinary duties, bind the bank: Simmons Hardware Co. v. Bank of Greenwood, 41 S. C. 177; 44 Am. St. Rep. 700, and note; note to Davenport v. Stone, 53 Am. St. Rep. 472.

MITCHELL *v.* NEGAUNEE.

[113 MICHIGAN, 359.]

MUNICIPAL CORPORATIONS—POWER TO CONTRACT FOR ELECTRIC LIGHTS.—A city may make a valid contract for the establishment of an electric light plant without having money in its treasury at the time which can be applied upon such contract, where there is no law or charter provision which prohibits it.

MUNICIPAL CORPORATIONS — RIGHT TO SUBMIT QUESTION OF ELECTRIC LIGHTS AT SPECIAL ELECTION.—The electors of a city may, if empowered by its charter, authorize the installing of an electric light plant at a special election.

MUNICIPAL CORPORATIONS — ELECTRIC LIGHT PLANTS—OWNERSHIP—PUBLIC SERVICE.—The furnishing of electric lights is a public service. Hence, the legislature may, under proper restrictions, authorize a city to own electric lighting plants, not only to light the streets and alleys of the city, but also to furnish lights to private parties.

MUNICIPAL CORPORATIONS—POWER TO TAX VACANT LANDS TO PAY FOR ELECTRIC LIGHTS.—A city, authorized to tax lands for public purposes, has power to tax vacant lands within its corporate limits, where the legislature has made no discrimination in their favor, for the purpose of installing an electric light plant within the city, to furnish not only lights needed by the city as a municipality, but lights for private individuals, although such lands, by reason of their remoteness, will not be benefited by electric lights.

Suit brought by Mitchell and others against the city of Negaunee, the Arbuckle-Ryan Company, and the Ft. Wayne Electric Corporation, to restrain the carrying out of certain contracts for the establishment of an electric light plant. The bill was dismissed, and the complainants appealed.

Hayden & Young, for the complainants.

F. A. Bell and Clark & Pearl, for the city.

F. D. Mead, for the other defendants.

360 MOORE, J. The city of Negaunee has a population of about six thousand people. In 1896 it made a contract with the Arbuckle-Ryan Co. for a steam plant complete for three thousand four hundred and seventy-four dollars. At the same time it made a contract with the Ft. Wayne Electric Corporation for an electric plant complete at a cost of six thousand five hundred dollars. This proceeding is brought by the complainants, who are large taxpayers, to restrain the carrying out of these

contracts. The circuit judge, after hearing the proofs in open court, dismissed the bill. Complainants appeal, assigning as grounds of their appeal: 1. The contracts were vitiated by the fraudulent conduct of the council, engineer, and the two contractors; 2. There was no money on hand in the treasury which could lawfully be applied to the purpose of installing an electric plant; 3. The electors could not authorize the installing of an electric plant at a special election; 4. The city of Negaunee has no power, and the legislature cannot confer upon it power, to tax lands which can receive no benefit, for the installation of an electric light plant to do municipal lighting, and to engage in the supplying of lights to private parties.

Taking these propositions up in the order in which they are presented, a careful examination of the record does not, in our judgment, establish any such fraud in relation to these contracts, or in the proceedings leading up to them, as would warrant a court in restraining the execution of them for that reason.

As to the proposition that there is no money on hand that can be applied to these contracts, there is no suggestion that there is any requirement in the charter, nor has any provision of law been called to our attention requiring, that the money shall be in the treasury before a contract of this kind can be entered upon. It is not necessary to discuss the claim that a sufficient amount of money arising from the liquor tax is now on hand, or will be in the treasury in time to meet the terms of the contracts.

This brings us to the next question. Can the electors [361] authorize the installation of this plant at a special election? A special election was called, at which a large majority of the electors voted in favor of establishing the plant. If the question was one that could be submitted at a special election, it was properly submitted, carried, and canvassed. The circuit judge found that act No. 186, Public Acts of 1891, as amended, and the provisions of the charter, authorize the electors to provide for the installation of such a plant at a special election, when ordered in the manner in which the special election was held. We think he was right in his conclusion: George v. Wyandotte Electric Light Co., 105 Mich. 1.

We now come to the important question in the case. Negaunee has been incorporated as a city a good many years. Lands of the complainants, which were unplatted, vacant, wild lands were inside the corporation prior to 1891. In that year the area of the city was greatly extended by the provisions of an amended charter. At this time a still larger quantity of com-

plainants' lands was included in the corporate limits. So far as the record discloses, no complaint has been made of this action until the filing of this bill. It is now claimed that the lands owned by the complainants which are not city lots, some of which are not improved, most of which are so remote as not to be benefited by electric lights, cannot be taxed to install a plant which is to be used not only to light the streets and alleys of the city, but also to furnish lights to private parties. It is urged that the right of taxation was never meant to be used to the detriment of the citizen, but for his benefit; that taxes can be imposed only for a public, and not a private, purpose. It is the contention that the taxing district in which the tax may be levied should be limited to the locality which is to be benefited by the expenditure of the tax, and that, as these lands will not be benefited by the installation of this plant, it is not right to tax the owners of them. Complainants say that neither the legislature nor the municipality can tax vacant lands for such purposes: Citing a number of authorities, [362] and, among others, Morford v. Unger, 8 Iowa, 82; Langworthy v. Dubuque, 13 Iowa, 86; O'Hare v. Dubuque, 22 Iowa, 144; Deeds v. Sanborn, 26 Iowa, 419; Deiman v. Ft. Madison, 30 Iowa, 542; Covington v. Southgate, 15 B. Mon. 491; Arbegust v. Louisville, 2 Bush, 271.

The Iowa cases fully sustain the contention of counsel, but as long ago as Merrill v. Humphrey, 24 Mich. 170, Justice Cooley, after quoting most of these cases, expressed a doubt as to whether they had not gone too far, and we now think they are clearly against the weight of authority. Cooley on Taxation, second edition, page 157, reads as follows: "City boundaries having been extended so as to embrace the lands of parties who insisted that their premises were agricultural lands merely, and would receive no benefit from the city government, such parties sought the protection of the courts, and prayed for injunction to restrain the imposition upon them of any tax in excess of what they would have been chargeable with had the boundaries not been extended to embrace them. It is to be observed of such cases that the legislature, which alone had authority to determine and fix the proper bounds of the municipal divisions of the state, and also to establish the taxing districts, had proceeded to do so, and, in fixing the city boundaries without any provision for a discrimination in the taxation of property within them, had, in effect, determined that no such discrimination should or ought to be made. The whole subject was one com-

mitted by the constitution exclusively to the judgment and discretion of the legislature, whose members, as in other cases of legislation, would make inquiry into the facts in their own way, and act upon their own reasons. No question could be made of the complete legislative jurisdiction over the case, and, if the action was unfair, and led to unequal and unjust consequences, it seems difficult to suggest any ground upon which it could be successfully assailed in the courts that would not warrant a judicial review of legislative action in every case in which parties complain of injustice and inequality. Nevertheless, in some cases the courts have considered themselves warranted in inquiring into the facts, in order to determine [363] whether, in their judgment, the extension of municipal boundaries was fairly warranted; and, having reached the conclusion that it was not, and that the extension was made for the purpose of subjecting to taxation adjacent property that would not receive the benefits of municipal government, and was not in fact urban property, they have undertaken to protect the owners of property thus unfairly brought in against the unequal taxation to which the legislation would expose them. In doing this they have not assumed to nullify the legislative action in extending the municipal limits, but they have undertaken to modify and relieve against its consequences, and to do this upon the express ground that the motive which has influenced the legislation was not legitimate. As the point is stated in one case, it is the palpable perversion of the power to tax which justifies the judicial interference. Some of these decisions are made by very able judges, whose opinions are always entitled to the highest respect; but it seems difficult to harmonize them with the conceded principles governing the law of taxation, for: 1. They do not question legislation as being in excess of legislative authority, as might be done where taxes are voted for a purpose not public, but they leave the legislation to stand, and only interfere to qualify its effect, on the ground that it has been adopted on improper grounds, and will operate unequally. 2. This is done on an inquiry into the facts, and a substitution of the judicial conclusion for the legislative on a subject not at all judicial; a subject, too—the proper limits of city extension—upon which persons are certain to differ widely, and where an inquiry into the facts after the judicial method of an examination of witnesses is usually much less satisfactory than that personal knowledge and investigation which legislators are supposed to possess or to make. This is certainly laying down a rule which cannot be

applied generally, it being admitted that the judiciary has no general authority to correct the injustice of legislative action in matters of taxation; and the weight of authority clearly is that, as regards these cases, the determination of the legislature is conclusive." This is undoubtedly according to the great weight of authority.

The inquiry naturally arises, Can the legislature authorize municipalities to own electric lighting plants which [364] shall furnish not only the lights needed by the municipality, but lights to its citizens? Act No. 186, Public Acts of 1891, authorizes, in terms, certain municipalities to construct electric lighting plants. Act No. 139, Public Acts of 1893, provides "that it shall be lawful for any city or incorporated village in this state, not having more than eight thousand inhabitants, which own and operate works for the purpose of supplying such city or village with electric light, and lighting their streets and other public places with electric light, to furnish and supply electric light to the inhabitants of such cities or villages, upon such terms and conditions as the common council may deem expedient." Act No. 41, Public Acts of 1895, authorizes cities and villages not having more than ten thousand inhabitants to furnish lights to the citizens. These provisions will stand if furnishing electric lights is a public service. This question arose recently in Massachusetts. The house of representatives of that commonwealth asked the opinion of the supreme court upon this question: Is the furnishing of electric lights a public service? The court replied in part as follows: "We have no doubt that, if the furnishing of gas and electricity for illuminating purposes is a public service, the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves and their inhabitants, and that such cities and towns can be authorized to impose taxes for this purpose upon their inhabitants, and to establish reasonable rates which the inhabitants who use the gas or electricity can be compelled to pay. The maintenance of public streets and buildings is a public service, and it may be reasonably necessary to light them, in order that the greatest public benefit may be obtained from using them. To say nothing of the usefulness of lighting streets as a means of promoting order and of affording protection to persons and property, the common convenience of the inhabitants may require that they be lighted. Cities and thickly-settled towns have for a long time been accustomed to light their public buildings and some of their streets at the pub-

lic expense. If the streets and public buildings are to be lighted, the means is a matter of expediency. [365] If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appropriate means which it may think expedient. As a question of constitutional power, we cannot distinguish the right to authorize cities and towns to buy gas or electricity for their use from the right to authorize them to manufacture it for their use.

"The maintenance of sewers and drains is a public service. One object is the preservation of the public health; but, apart from this, they are of great convenience to the inhabitants whose estates can be drained by them. It is impracticable for every owner of land in cities and towns to construct and maintain sewers and drains exclusively on his own account. They cannot ordinarily be constructed over any considerable territory without using the public ways or exercising the right of eminent domain. They are, therefore, regarded as of common convenience, and are constructed at the public expense.

"The furnishing of water for cities and towns for domestic use affords, perhaps, the nearest analogy to the subject we are considering. It was long ago declared that 'the supply of a large number of inhabitants with pure water is a public purpose': Lumbard v. Stearns, 4 Cush. 60. The statutes are well known which authorize cities and towns to maintain waterworks for supplying their inhabitants with water, and the constitutionality of these statutes has not been doubted. Water cannot be supplied to a large city or town from ponds or streams without the exercise of the right of eminent domain and the use of the public ways. Every inhabitant needs water, and often the only practicable method of obtaining it is by the agency of corporations or of the municipality. The land for the public ways having been taken for a public use, it may be subjected to other public uses, but it cannot be subjected to strictly private uses without the consent of the owners of the fee when the fee remains in the abutters. There is, therefore, often a necessity of having water, common to the inhabitants of a community, which cannot well be met except by the exercise of public rights, and therefore the furnishing of water has been considered a public service. In the case of water, as in that of sewers and drains, a portion of the service is exclusively public, and the benefit to individuals cannot be separately estimated from that of the community; but a part of the service is rendered to individuals, and the benefit of this can [366] be separately estimated. The inhabitants are,

therefore, required to pay for the water furnished for their private use, and special assessments for the use of sewers and drains are laid upon estates specially benefited; and for the same reasons, while in laying out highways the expense is public, betterment assessments may be laid upon the owners of lands specially benefited.

"Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly-settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets or the exercise of the right of eminent domain. It is not necessarily an objection to a public work maintained by a city or town that it incidentally benefits some individuals more than others, or that from the place of residence, or for other reasons, every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But, in general, it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them, and may participate in them, and it is for the interest of each inhabitant that others, as well as himself, should possess and enjoy them. If the legislature is of opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think that the legislature can confer the power": Opinion of Justices, 150 Mass. 592: See 2 Dillon on Municipal Corporations, sec. 692, note; Rushville Gas Co. [367] v. Rushville, 121 Ind. 206; 16 Am. St. Rep. 388; Crawfordsville v. Braden, 130 Ind. 149; 30 Am. St. Rep. 214. In this case the recent authorities are referred to, and reviewed:

State v. Toledo, 48 Ohio St. 112; Cooley on Taxation, 2d ed., 134.

It is conceded by counsel for complainants that municipalities may furnish water to their citizens. They seek to distinguish the right to furnish water from the right to furnish light by saying that water is a necessity for all, but that electric light is a luxury. It will hardly be contended that the necessities of modern life do not require light as well as water, and we think the reasoning of the cases cited shows conclusively that it is within the legislative province to confer upon municipalities the right to furnish both under proper restrictions.

The decree is affirmed, with costs.

The other justices concurred.

MUNICIPAL CORPORATIONS—ELECTRIC LIGHTS.—Supplying the inhabitants of cities with electric light is such a municipal purpose as authorizes its delegation by the legislature to municipal corporations: Jacksonville etc. Co. v. Jacksonville, 36 Fla. 229; 51 Am. St. Rep. 24. A city may establish and maintain works for lighting its streets by electricity, and may, at the same time, furnish such light to the inhabitants, to light their residences and places of business: Crawfordsville v. Braden, 130 Ind. 149; 30 Am. St. Rep. 214; Jacksonville etc. Co. v. Jacksonville, 36 Fla. 229; 51 Am. St. Rep. 24. Courts will enforce a contract entered into by a city to purchase materials and to employ labor for lighting streets by electricity, where the charter of the city empowers it to own and operate electric light plants: Rockebrandt v. Madison, 9 Ind. App. 227; 53 Am. St. Rep. 348.

MUNICIPAL CORPORATIONS—TAXES.—FARMING LANDS within a city are subject to municipal taxation, although they are not benefited by the objects for which such taxes are levied: Cary v. Pekin, 88 Ill. 154; 30 Am. Rep. 543; Kelly v. Pittsburgh, 85 Pa. St. 170; 27 Am. Rep. 633.

JONES *v.* MERRILL.

[113 MICHIGAN, 433.]

PROCESS—ADMISSION OF SERVICE—WAIVER OF SERVICE.—While a bare admission of the fact of service of process beyond the territorial jurisdiction of the court should not be deemed a waiver of service, yet an admission of service so worded as to clearly evidence an intent to waive further service should be held to amount to a waiver.

JURISDICTION—ADMISSION, IN ANOTHER STATE, OF SERVICE OF PROCESS.—An admission of "due" personal service of a subpœna, by a defendant in another state, shows a clear intent to waive further service of process, and is sufficient to confer, upon a court of this state, jurisdiction of the subject matter in a foreclosure proceeding.

EJECTMENT—OCCUPANCY—COMPENSATION FOR IMPROVEMENTS—EVIDENCE.—Under a statute allowing compensation for improvements, made by defendants in ejectment, who shall have "occupied" the premises for a less time than six years, under

a color of title and in good faith, a defendant in ejectment who, before the commencement of the action, entered upon the premises in good faith, under color of title, painted the exterior of the house, shingled a portion of the roof, and moved some things into the house, is entitled to recover for such improvements, and it is error to exclude such evidence of occupancy, for the occupancy required by such a statute does not imply that the claimant shall have actually lived and made his home upon the disputed property.

EJECTMENT — OCCUPANCY — QUESTION OF GOOD FAITH IS FOR JURY.—If the circumstances, in an action of ejectment, throw doubt upon the defendant's good faith in occupying the property, this is a question for the jury.

Ejectment by Susan L. Jones against Esther E. Merrill. The court directed a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Philip W. Niskern, for the appellant.

Chamberlain & Cross, for the appellee.

434 MONTGOMERY, J. Ejectment for a house and lot in the city of Muskegon. Plaintiff claims title under a foreclosure in equity of a mortgage executed by Melissa C. Livermore. Defendant claimed, at the time of the entry hereinafter referred to, under a commissioner's deed executed in pursuance of a sale under certain chancery proceedings, the nature of which is not very clearly shown in the record. Defendant also filed a claim for compensation for improvements made upon the premises. Two questions are presented: 1. Whether the foreclosure under which plaintiff derives title was valid; and 2. Whether the defendant had such possession when the improvements were made upon the land as entitled her to recover the increased value of the premises by reason of such improvements, or, more accurately, whether there was evidence for the jury tending to show such occupancy and the good faith of defendant.

1. The validity of the foreclosure proceedings depends wholly upon the question of whether the court obtained jurisdiction by an acceptance of service signed by the defendant in that proceeding in Montana. The language of the acceptance indorsed upon the subpoena was as follows:

"I hereby admit due personal service upon me of the within subpoena this 11th day of September, 1894.

"MELISSA C. LIVERMORE."

435 We had occasion to refer to this subject in Allured v. Voller, 107 Mich. 476. In that case it appeared that there was an acceptance beyond the jurisdiction of the court, in which acceptance there was also a waiver of formal service by an officer,

and a permission to the plaintiff to proceed with the case the same as though service had been made as commanded in said summons. As was said in that case, the authorities are not harmonious upon the subject of a mere acceptance of the service of a writ beyond the jurisdiction of the court. It became unnecessary for us to determine the effect of such acceptance in that case, as we deemed that there was an express waiver and authority in writing conferred upon the plaintiff to proceed with the case. In the present case, it is unnecessary to determine the effect of a mere acceptance of a service shown upon its face to be beyond the jurisdiction of the court. In this case the acceptance purports to be an acceptance of due personal service, which means a service which will confer jurisdiction upon the court. The case of Cheney v. Harding, 21 Neb. 65, goes further than is necessary to sustain the holding of the circuit judge in this case. In that case the admission of service showed upon its face that the service was made at the residence of the party, in another state. Yet the court held that the defendant was bound by such acknowledgment or acceptance of service, even though outside the territorial jurisdiction of the court to which it was returnable.

In the early case of Dunn v. Dunn, 4 Paige, 430, Chancellor Walworth said: "In all cases where the court has jurisdiction over the subject matter of the suit, if the defendant, who is beyond the limits of the state, thinks proper to waive that objection by a voluntary appearance, or by consenting to accept as regular the service of process upon him at the place where he resides or is found, he cannot afterward object to the regularity of the proceedings against him, founded on such service."

In the case of Vermont Farm-Machine Co. v. Marble, 20 Fed. Rep. 117, it appeared that the defendant accepted service [436] of the subpoena, "to have the same effect as if duly served on him by a proper officer." It was held that in so accepting service the defendant subjected himself to the jurisdiction of a court sitting in a district of which he was not a resident: See, also, Ex parte Schollenberger, 96 U. S. 369; Laramore v. Chastian, 25 Ga. 592; Shaw v. National State Bank, 49 Iowa, 179. The case of Weatherbee v. Weatherbee, 20 Wis. 499, distinctly holds the opposite doctrine. But that case is in conflict with our own holding in Allured v. Voller, 107 Mich. 476, and an attempt was made to distinguish it in Keeler v. Keeler, 24 Wis. 522. We think it an entirely safe rule that a party may waive service of process by any act clearly evidencing an intention to do so.

The bare admission of the fact of service beyond the territorial jurisdiction of the court should not be deemed a waiver. But an admission of service so worded as to clearly evidence an intent to waive further service should be held to amount to a waiver. Such intent is clear in the present case.

2. The defendant offered evidence to show that, before the commencement of the action of ejectment, she entered upon the premises, painted the exterior of the house, shingled a portion of the roof, and moved some things into the house. She sought to recover for these improvements. The circuit judge was of the opinion that she had not shown such occupancy as is contemplated by section 7836 of 3 Howell's Statutes, which provides for compensation for improvements made by defendants in ejectment who shall have been in the actual, peaceable occupation of the premises for six years before the commencement of the action, or who shall have occupied for a less time than six years under a color of title and in good faith. We think by this term "occupancy" is meant such an occupancy as, under the rules of the common law, would entitle one to acquire a title by adverse possession. It must be actual, open, and peaceable. But this does not necessarily imply that the claimants shall have actually lived and made their home upon the disputed property. [437] If it were constantly worked year after year, if cropped, or if shrubs and trees were planted and cared for, and such attention given as they required, or if fences were built, such an occupancy is actual, rather than constructive, and is such an occupancy as the statute contemplates.

It is doubtless true that there is enough in this record to throw some doubt upon the defendant's good faith, but this would be a question for the jury: Miller v. Clark, 56 Mich. 344.

We think there was error in excluding the evidence of defendant upon this branch of the case, and that for this error the judgment should be reversed and a new trial ordered.

Long, C. J., Grant and Moore, JJ., concurred.

Hooker, J., did not sit.

JURISDICTION—SERVICE OF PROCESS UPON NONRESIDENT OUT OF THE STATE.—In Kansas, a judgment determining conflicting claims of title to real estate, based upon service of process made upon a nonresident, out of the state, is treated as valid against him: Note to Alley v. Caspari, 6 Am. St. Rep. 182, on jurisdiction of the courts of one state or country over citizens of another. Service outside of the state of notice or process, when not authorized by law, is a nullity; and service of process beyond the state cannot authorize a personal judgment: Wilson v. St. Louis etc. Ry. Co., 108 Mo. 588; 32 Am. St. Rep. 624.

PROCESS—SERVICE OF SUMMONS.—Being "duly served with summons" implies that the defendant has been served with summons in the manner directed by law, in every particular, requiring him to appear in the court of the county where the judgment is taken: White v. Johnson, 27 Or. 282; 50 Am. St. Rep. 726.

EJECTMENT—BETTERMENTS.—A person in possession of land, claiming to own the same, is entitled, upon being evicted by a superior title, to have the value of improvements placed by him, in good faith, upon the land: Boatner v. Ventress, 8 Mart., N. S., 644; 20 Am. Dec. 266. See, also, Barrett v. Stradl, 73 Wis. 385; 9 Am. St. Rep. 795, and note.

PENROSE *v.* FEHR.

[113 MICHIGAN, 517.]

NEGLIGENCE—RUNNING ON SIDEWALK TO ESCAPE SNOWBALLS.—The act of running on a sidewalk, to avoid being hit by snowballs, is not negligence per se, and does not, of itself, preclude a right to recover for injuries sustained by falling into an unguarded excavation while so running. The question of contributory negligence, in such a case, is for the jury.

Case by Wesley Penrose, an infant, by William Penrose, his next friend, against Fred Fehr, for personal injuries caused by the plaintiff's falling into an unguarded excavation, which had been made by the defendant, while running on a sidewalk, to escape being struck by snowballs, that were being thrown by several boys. The plaintiff, a boy about seventeen years of age, testified that he saw the excavation as he approached it, but not in time to stop, and that if he had been walking, he thought he would have seen it in time to stop. There was a judgment for the plaintiff and the defendant appealed.

C. E. Miller, for the appellant.

Julius J. Patek and Charles A. Withey, for the appellee.

518 GRANT, J. The negligence of the defendant, through his employés, in not guarding the excavation, is admitted. The defendant requested the court to instruct the jury that the plaintiff was guilty of contributory negligence, and could not recover. The question of his contributory negligence was left to the jury, under the usual and proper instructions. The theory of the defendant is, that walking is the ordinary method of traveling upon sidewalks, and that, where one falls in consequence of running, the municipality is not liable. The act of running in this case was not per se negligence. One has a right to run upon the streets and sidewalks in order to escape from the assaults of oth-

ers, and for many other reasons, and in such cases the question of contributory negligence is for the jury.

The judgment is affirmed.

The other justices concurred.

PLAYING ON STREET OR SIDEWALK—INJURY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—It is not unlawful to use a street or sidewalk for the purposes of play, and if, while so using it, one is injured by a defect therein, the question as to whether he was guilty of contributory negligence at the time is one for the jury: Chicago v. Keefe, 114 Ill. 222; 55 Am. Rep. 860, and note, discussing this class of cases; Barry v. Terkildsen, 72 Cal. 254; 1 Am. St. Rep. 55. When considerable doubt exists as to whether or not the plaintiff is guilty of contributory negligence, that question should be submitted to the jury for its determination: People's Bank v. Morgolofski, 75 Md. 432; 32 Am. St. Rep. 403; note to Valin v. Milwaukee etc. R. R. Co., 33 Am. St. Rep. 28. Negligence, except in the failure to perform a statutory duty, is rarely a question of law: Note to Harris v. Clinton, 8 Am. St. Rep. 849.

KUNZE *v.* COX.

[113 MICHIGAN, 546.]

TROVER—CONVERSION BY OFFICER LEVYING UPON PARTNERSHIP PROPERTY.—It is not conversion for an officer to levy upon partnership property wrongfully, and to advertise it for sale. To sustain trover against him, it must appear that the partners have been deprived of the possession of the property, by removal or otherwise, under circumstances which show that the officer is legally chargeable with such deprivation.

EXECUTION — PARTNERSHIP PROPERTY — LEVY AGAINST INDIVIDUAL PARTNER—INTEREST SUBJECT TO LEVY.—While an execution creditor of an individual partner may levy upon the interest of the execution debtor in the partnership property, such interest must be treated as consisting of a right to an aliquot share of what remains after the payment of partnership debts and the adjustment of accounts between the partners.

EXECUTION AGAINST ONE PARTNER—VALIDITY OF LEVY.—A valid levy of execution against one member of a firm must cover his interest in the entire partnership property. Hence, a levy upon the partner's interest in a specified pile of partnership lumber is invalid where the pile does not include all of the partnership property.

PARTNERSHIP—INVALID LEVY AGAINST ONE PARTNER ON FIRM PROPERTY—RIGHT OF ACTION.—If a levy of execution against one partner, on partnership property, is void, and there has been a wrongful sale and conversion of the property, the partners have a joint right of action for such conversion.

Trover by Kunze and Sullivan, copartners, against Cox, a sheriff. There was a judgment for the defendant, and the plaintiffs appealed.

Albert E. Sharpe, for the appellants.

M. J. Connine and N. C. Hartingh, for the appellee.

547 HOOKER, J. The plaintiffs were copartners in the business of lumbering, and had certain lumber in different piles. It is claimed that the defendant converted two of these piles of lumber, by selling them separately, under different levies, upon an execution for the debt of Kunze, one of the copartners. There is evidence tending to show that the pile first sold was set off to Kunze by direction of Sullivan; but, however that may be, the defendant attempted to show that he sold only the interest of Kunze in that pile, and that the bidders and purchasers at the sale were told by him, and understood, that his interest only was offered, and that whoever should buy it would take the lumber subject to Sullivan's right, with whom the purchaser would be obliged to settle, and that Sullivan's interest could be had for three dollars per M feet, which price Sullivan had consented to take if defendant should sell the lumber. This lumber was removed by McDonald, the purchaser. The other pile of lumber was not removed by the purchaser, and remains where it was at the time of the sale. It is clear that it was partnership property, and there may be nothing to show that the sheriff ever took manual possession of or delivered the lumber to anyone. He claims to have sold only Kunze's interest in this pile. The notice of sale advertised a seizure of the property on execution against Kunze and one Frank, and, continuing, said, "All of which I will expose for sale," et cetera. The notice of the other sale was substantially the same. To McDonald the defendant delivered a bill of sale of the lumber first sold, which stated that he "did advertise and sell the said lumber. I hereby convey and set over to said McDonald all of said culls as levied upon, and all right, title, and interest acquired by and under said execution; and I hereby deliver possession thereof to him."

It is contended by plaintiffs: 1. That these notices and bill of sale show a levy and sale of the entire ownership of the lumber levied upon, and that testimony tending to show a sale of 548 Kunze's interest merely was inadmissible, as it contradicted the writings; 2. That the levies were void, because neither nor both included all of the partnership property, but specific articles of it merely, and that a valid levy must cover the partner's interest in the entire partnership property.

The action is trover, and, to sustain it, it was necessary that it be shown that some of this property was converted by the defendant. The fact that it was levied upon and advertised is not sufficient to establish a conversion. Someone must have taken

it into possession, and deprived the plaintiffs of it, by removal or otherwise, under circumstances which show that the defendant was legally chargeable with such deprivation. If, therefore, a sale of Kunze's interest alone would have been valid under this execution, or if the plaintiffs were not deprived of their property, it was competent to prove that only Kunze's interest was sold, and that the lumber was never taken possession of or converted in any way. One of these piles of lumber was removed, and to some extent, at least, was converted. McDonald bought some interest in it, and took away all of the lumber in that pile. It does not appear that he ever adjusted the matter with Sullivan, and the latter denied having consented that a sale might be made upon the terms stated. If he did, it does not appear by any testimony that the sheriff sold the interest of both parties under this alleged permission, and it is hardly inferable from any testimony that Sullivan consented to a sale of Kunze's interest with the expectation that the purchaser and himself might afterward adjust his interest at three dollars per M; so that the remaining questions are: 1. Whether this levy was upon lumber belonging solely to Kunze; and 2. If not, whether a levy upon the interest of one partner in a specific pile of partnership lumber, which did not include the whole partnership property, was valid.

The first of these questions is one of fact, and we cannot certainly say that the jury found with the defendant upon it. We cannot say that it was an undisputed fact. Upon [549] the second, we think the trial court was in error in the conclusion that a valid levy upon a specific portion of the stock could be made. A want of uniformity of practice is found upon this subject, but the weight of authority sustains the doctrine that, while the execution creditor of the individual partner may levy opon the interest of the execution debtor in the partnership property, such interest must be treated as consisting of a right to an aliquot share of what remains after the payment of partnership debts and the adjustment of accounts between the partners. As the partner has not the right to appropriate to his own use, as against his partner, specific articles of partnership property, neither can the execution creditor, who cannot stand in a better position than the partner himself. The sheriff, therefore, cannot seize or deliver specific articles, and it may be doubtful if he can do more, in any case, than to sell the entire interest of the debtor, leaving the purchaser to secure his rights by proceedings for an accounting against the copartner of the debtor.

This question will be found discussed in 2 Bates on Partnership, sec. 1097 et seq., and 1 Freeman on Executions, section 125, where numerous authorities are cited. In our own state this doctrine appears to have been approved: See Sirrine v. Briggs, 31 Mich. 443, where Mr. Justice Cooley said: "It is plain that he could not, by virtue of an execution against only one of the partners, proceed to levy, as he did, upon specific articles of the stock only. The levy in such a case must be upon the partner's interest in the whole stock, for the only individual interest that he has is his share in what shall remain after the partnership debts are paid and the accounts between the partners adjusted."

Again, in Lambert v. Griffith, 50 Mich. 286, it was said: "The interest of a partner is generally his share of the assets after all accounts are settled among the partners, and the debts paid." In Haynes v. Knowles, 36 Mich. 407, an attachment upon specific chattels was held to be a trespass; and in Hutchinson v. Dubois, 45 Mich. [550] 143, it was held that a "partner's interest is not an interest in specific articles, but only in the surplus," et cetera, and "that the utmost extent of the officer's right, if he can levy at all, must be to seize the interest of the partner, whatever it may be, subject to all the partnership debts and to the final accounting." In that case the court said, further: "But whether he took the whole or only part, is immaterial. In either case he seized specific articles, when he had a right to seize an undivided and indefinite interest only. He did this also in total disregard of the plaintiff's rights; for whereas the judgment debtor, as partner, could only have had joint possession with the plaintiff, the officer, levying on his right, assumed to take exclusive possession and remove the property to another place. As was said by Mr. Justice Campbell in Haynes v. Knowles, 36 Mich. 407, 410: 'The partner not sued cannot, on any principle of justice, be placed in any worse condition by a creditor of his partner than he could have been by his own partner.' At most, for the purposes of his writ, the officer only takes the debtor's place, and seizes an interest that can only be measured by final account: Vandike v. Rosskam, 67 Pa. St. 330."

It seems obvious that this levy was invalid, and if the defendant was a party to a wrongful conversion by McDonald, as his bill of sale seems to indicate, he might be liable.

The levy being void, there is no reason for denying the right of action by the partners jointly.

The judgment is reversed, and a new trial ordered.

The other justices concurred.

TROVER—CONVERSION—WHAT IS ESSENTIAL TO.—Conversion, to sustain trover, must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it, or a withholding of possession under a claim of title inconsistent with the title of the owner: Note to Terry v. Birmingham Nat. Bank, 30 Am. St. Rep. 94.

EXECUTION—PARTNERSHIP PROPERTY—LEVY AGAINST INDIVIDUAL PARTNER—INTEREST SUBJECT TO LEVY.—A levy on partnership assets of a writ against one partner only, and a sale under execution, passes nothing beyond the right to demand an accounting and to share in the surplus that may remain after all the partnership obligations have been discharged: See monographic note to Russell v. Cole, 57 Am. St. Rep. 441, discussing the question, and showing, at page 440, that there is a division of authority upon the question as to whether specific chattels of a partnership can be levied on under an execution against one partner only. Cases are there cited showing that the levy must extend to all the personal assets of the partnership.

CONVERSION BY LEVY ON PARTNERSHIP PROPERTY—RIGHT OF ACTION FOR DAMAGES.—If an officer levies on partnership property, on a writ against one partner only, and he assumes to sell the whole property, his act, as to the partners not named in the writ, is wrongful, and they may regard him as a trespasser upon their rights, or as guilty of an unlawful conversion of their property, and may, therefore, maintain an action against him to recover damages sustained by them from such conversion: Note to Russell v. Cole, 57 Am. St. Rep. 441.

SCRANTON *v.* WHEELER.

[113 MICHIGAN, 565.]

JURISDICTION OVER SUBMERGED LANDS ALONG NAVIGABLE WATERS.—A state court is not deprived of jurisdiction, in an action of ejectment to recover submerged land, by the fact that the defendant is, on behalf of the federal government, in possession of the land for the purpose of erecting piers thereon in aid of navigation upon the Great Lakes and the rivers connecting them.

EJECTMENT AGAINST THE GOVERNMENT, STATE OR NATIONAL—DEFENSE.—When one in the actual possession of property defends his right of possession, in an action of ejectment, upon the ground that the government, state or national, has placed him in possession, he must show that the right of the government is paramount to the right of the plaintiff, or judgment will go against him.

WATERS, NAVIGABLE—QUALIFIED TITLE OF OWNER TO SUBMERGED LANDS.—The title of a riparian owner to submerged lands along navigable waters, and his right of access thereto, are subject to the paramount right of the United States to use the lands, without compensation to the owner, in such manner as it shall determine to be necessary in aid of navigation.

Ejectment by Scranton against Wheeler. The case originated, in 1891, in the circuit court of Chippewa county, to recover possession of certain land beneath the water of St. Mary's river, extending from the river bank to the thread of the stream.

The defendant was then the superintendent of the St. Mary's Falls Canal, under the authority of the United States government. A petition was filed by the defendant, after issue joined, for the removal of the cause to a federal court, on the ground: 1. That the defendant was in possession for the United States, as superintendent of the canal, and that the United States was the real party in interest; 2. That the suit arose under the laws of the United States. The suit was thereupon removed to and tried in a circuit court of the United States, resulting in a judgment for the defendant. The case was then removed, by a writ of error, to the United States court of appeals, and there affirmed: Scranton v. Wheeler, 57 Fed. Rep. 803; 16 U. S. App. 152. It was then appealed to the supreme court of the United States, but was dismissed for the reason that the pleadings did not present a federal question. The supreme court then remanded the case to the state court for trial, which was had, resulting in a judgment for the defendant, on a verdict directed by the court, and the plaintiff appealed.

Harlow P. Davock and John C. Donnelly, for the appellant.

John Power, United States district attorney, for the appellee.

506 GRANT, J. 1. The learned circuit judge directed a verdict for the defendant upon the ground that the judgment against the defendant, Wheeler, would, in effect, be a judgment against the United States and its property. In this the court was in error. When one in the actual possession of property defends his right of possession upon the ground that the government, state or national, has placed him in possession, he must show that the right of the government is paramount to the right 507 of the plaintiff, or judgment will go against him. This point has been settled by the decision of the supreme court of the United States rendered May 10, 1897: Tindal v. Wesley, 167 U. S. 204. In that case the authorities upon this point are reviewed at length, including the case of Stanley v. Schwalby, 162 U. S. 255, upon which defendant mainly relies.

2. The United States government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them. That the improvements made were necessary to aid and protect this navigation is established beyond dispute. Had the government the right to make these improvements upon the submerged land without compensation

to the adjoining owner? It is conceded that under the law of Michigan the title to submerged land is in the adjoining owner to the thread of the stream. It is insisted in behalf of the plaintiff that the government possesses no right to so use his land, although submerged, and although necessary to so use it in aid of navigation, as to cut off his access to the open water. It is contended on the other hand that this title to submerged lands along navigable waters, and the right of access thereto, are subject to the paramount right of the United States to use this land in such manner as it shall determine to be necessary in aid of navigation. The court of appeals was unanimous in its opinion against the plaintiff's claim. In a very able opinion delivered by Judge Lurton the facts are clearly stated, the authorities cited, and we think the conclusion there reached is the correct one. We therefore deem it unnecessary for us to enter into a long discussion of the law and the authorities. The case of Hawkins Point Lighthouse, 39 Fed. Rep. 77, appears to be exactly in point, and to rule the present case.

We think the conclusion reached by the court below was a correct one, although it gave a wrong reason.

The judgment is affirmed.

The other justices concurred.

TIDE LANDS—JURISDICTION—TITLE—TAKING WITHOUT COMPENSATION.—The state has control over navigable rivers and submerged lands, for it has title to submerged lands subject to the paramount right of the United States to use the water upon such lands for the purposes of navigation and commerce: Sage v. Mayor, 154 N. Y. 61; 61 Am. St. Rep. 592; Allen v. Allen, 19 R. I. 114; 61 Am. St. Rep. 738; monographic note to People v. Kirk, 53 Am. St. Rep. 289-300, on the title to land covered by tidal and other navigable waters. The United States may use submerged lands in aid of commerce and navigation without making compensation to the riparian proprietor. See monographic note to Miller v. Mendenhall, 19 Am. St. Rep. 233, on the rights of landowners in navigable waters fronting their lands, and in the lands under such waters.

EJECTMENT—NATIONAL GOVERNMENT.—Ejectment may be brought against a federal officer in possession of the demanded premises, by authority of the United States; Polack v. Mansfield, 44 Cal. 36; 13 Am. Rep. 151.

MICHIGAN TRUST CO. *v.* GRAND RAPIDS DEMOCRAT.

[113 MICHIGAN, 615.]

INSOLVENCY—DEBTS FOR LABOR AS PREFERRED CLAIMS.—A STATUTE making debts for labor preferred claims against the estate of an insolvent has reference to manual, rather than intellectual, labor, and the work intended to be covered by the statute is manual labor.

INSOLVENCY—DEBTS FOR LABOR AS PREFERRED CLAIMS—MAILING CLERK.—Under a statute making debts for labor preferred claims against the estate of an insolvent, a debt due from an insolvent newspaper corporation to a mailing clerk for getting out, addressing, and mailing the paper to various subscribers is a debt for labor, as the work is mechanical and manual.

INSOLVENCY—DEBTS FOR LABOR AS PREFERRED CLAIMS—INTELLECTUAL WORK.—Under a statute making debts for labor preferred claims against the estate of an insolvent, debts due from an insolvent newspaper corporation to those who gather news items, do editorial work, prepare and correct copy, and read proof, are not debts for labor, for such work is intellectual, not manual, and is not intended to be covered by such a statute.

INSOLVENCY—PREFERRED CLAIM MAY BE ALLOWED, WHEN.—A court may, in favor of an intervenor, in proceedings against an insolvent, provide for the payment of a preferred labor claim out of a fund in court, although the claim was not filed until after a decree was rendered in favor of other intervenors, to secure the payment of preferred claims, and the decree has not been reopened or modified.

Bill brought by the trust company to foreclose a chattel mortgage. M. Almy Aldrich and other employés of the defendant newspaper corporation severally filed petitions as intervenors for preference as to their several claims for compensation. There was a decree in favor of the intervenors, and the complainant appealed.

Fletcher & Wanty, for the complainant.

Kingsley & Kleinhaus, for the defendant.

Hatch & Wilson, for the intervenor M. Almy Aldrich.

Peter Doran, for the intervenors Edwin J. Bulkley and William M. Hathaway.

Stuart & Barker, for the intervenor Clarence J. Toot.

[616] MOORE, J. The intervenors were allowed certain claims, which complainant was directed to pay as preferred claims. It is the claim of the intervenors that the claims were properly allowed as preferred claims, under the provisions of 3 Howell's Statutes, section 8749 m, which provides that: "All debts which shall be owing for labor by any person or persons or corporation at the time he, they, or it shall become insolvent shall be preferred claims against the estate of such insolvent debtor or debtors, and have precedence in the payment thereof over all debts owing by such insolvent debtor or debtors at the time of becoming insolvent, which shall not have become a lien on such estate, or some portion thereof, prior to the performance of the labor for which such debts for labor shall be owing."

The first petition of Aldrich states that: "The nature of the work and labor performed by your petitioner was the writing of editorials, and the performing of various kinds of editorial work, required to be done on the daily and weekly issues of the Grand Rapids Democrat, the newspaper published by the said defendant, the preparation and correction of copy for the printers, the direction of the make-up of the paper, including full charge of all branches of the mechanical department of said paper after the close of the business office each night."

His second petition states the nature of the work to be the same, only adding that the editorial work was done under the direction of a superior. The petition of Clarence [617] J. Toot states that the nature of the work performed by him was that of mailing clerk, which consisted in attending to the getting out, addressing, and mailing of the newspaper to its various subscribers, and putting in appropriate packages, and delivering to the proper persons, the proper number of papers allotted to each. The petition of Edwin J. Bulkley says that the nature of the work performed by him was that of proof-reading, and traveling around the city, gathering news. The petition of William M. Hathaway states that the nature of the work performed by him was that of reporting, going around to the different wholesale houses, collecting market reports, and assisting in editorial work and proof-reading.

This statute has been repeatedly construed by this court, and, while the precise questions raised in this proceeding have not been passed upon, we think the logic of the decisions is against the decree found by the learned circuit judge. The labor performed by the petitioners, with one exception, was intellectual, rather than manual. It was the work of professional men, rather than the work of laborers, giving the word its ordinary acceptation, and is not such work as is intended to be covered by the statute: In re Clark, 92 Mich. 351; In re Sayles, 92 Mich. 354; Appeal of Clark, 100 Mich. 448. The exception mentioned is the work performed by Mr. Toot. His labor was mechanical and manual, and is clearly embraced within the terms of the statute: Appeal of Black, 83 Mich. 513.

It is said that, as the petition embracing the claim of Mr. Toot was not filed until after the decree was rendered, and the decree has not been reopened or modified, it is too late to give Mr. Toot any relief. The decree embraces items of accounts and bills receivable that were assigned after this work was done to Mr. Stevenson, and afterward assigned by him to the com-

plainant. This decree provides that the fund be brought into court, and apportions to Mr. Stevenson upwards of two thousand dollars. As Mr. Stevenson's claim is subsequent to that of Mr. Toot, we can see no [618] great difficulty in providing for the payment of Mr. Toot's claim out of the fund, and it will be so ordered.

The decree, as to the other petitions, will be reversed, and petitions dismissed, appellant to recover costs, except as to Mr. Toot, and Mr. Toot to recover costs.

The other justices concurred.

A CLAIM FOR LABOR, at least within the meaning of exemption and lien laws, has reference to manual labor, and clerks, agents and like employés, whose employment is associated with mental labor and skill, are not deemed laborers: See monographic note to Oliver v. Macon Hardware Co., 58 Am. St. Rep. 305, 306, on who are laborers.

MURFIN *v.* DETROIT & ERIN PLANK-ROAD COMPANY.

[113 MICHIGAN, 675.]

BICYCLES—TOLL FOR ON HIGHWAYS.—A statute authorizing an incorporated plank-road company to exact tolls, in a specified sum, for any "vehicle drawn by one or more animals" does not apply to bicycles.

Gray & Gray and Charles M. Swift, for the appellant.

Griffin, Clark & Russell, for the appellee.

[676] HOOKER, J. This is an action brought against a toll-road company for stopping the plaintiff at defendant's toll-gate, and preventing him from proceeding to ride a bicycle upon its road without the payment of toll. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff.

The only question submitted is that of the right of the defendant to charge toll for the use of its road by persons riding bicycles. The rights of the defendant are statutory, and its right to charge toll is to be determined by section 3582 of 1 Howell's Statutes, viz: "Whenever any such company shall have completed their road, or any five consecutive miles thereof, the directors thereof may erect toll-gates, and exact tolls from persons traveling on their road, for so much as may be completed, at a rate not exceeding two cents per mile for any vehicle or carriage drawn by two animals, and one cent per mile for every sled or sleigh so drawn, and if drawn by more than two animals, three-

quarters of a cent per mile for every additional animal; for every vehicle, sled, sleigh, or carriage drawn by one animal, one cent a mile; for every score of sheep or swine, half a cent a mile; for every score of neat cattle, two cents a mile; and for every horse and rider, or led horse, one cent a mile. Such toll-gates so to be erected by such company may be as many in number, and located at such points, as such company may deem necessary."

If we could construe this statute as giving a right to collect tolls from all persons who travel the road, there would be little difficulty in holding that bicycles (which we held to be vehicles in Myers v. Hinds, 110 Mich. 300, 64 Am. St. Rep. 345), are subject to toll, for we may take judicial notice that a good highway is as essential to their use as to that of any other vehicle. There is nothing in this act that gives the right to charge toll against pedestrians, and we have never heard it claimed that such charges were made. Nor have we known of toll being charged for wheelbarrows, or carts, or handsleds, or baby cariages propelled by human agency, though a good road is as essential to these as to bicycles. If this question arose with reference to [677] a four-wheeled vehicle propelled by steam or electricity, there would probably be little doubt of the right to charge and collect toll. It would seem to be covered by the case of Detroit etc. Plank-Road Co. v. Detroit Suburban Ry. Co., 103 Mich. 585, where it was held that the rights acquired under this act forbid the use of the highway for purposes inconsistent with the rights and franchises of the plank-road company. The use of two wheels instead of four, if propelled by a motor, as they are liable any day to be, would hardly suffice to distinguish them from the heavier and more cumbersome vehicle; and we hestitate to say that the courts could with propriety hold that a motor cycle could escape tolls under this statute, notwithstanding the fact that only vehicles drawn by animals are mentioned in the act.

We think, however, that a distinction may be made between vehicles propelled by man and those depending upon animal power or mechanical motors for propulsion, and that this would not do violence to the act, which has always been construed to permit the use of highways by persons who did not depend upon some means of conveyance besides their own powers of locomotion. The bicycle of to-day is propelled and managed by the feet and hands of the rider. It uses the traveled roadway only when it is the better part of the highway, and the pedestrian does the same. The projected electric railroad involved in the case of Detroit etc. Plank-Road Co. v. Detroit Suburban Ry. Co.,

103 Mich. 585, was not expected to use the roadway constructed by the plank-road company, but one to be built for its exclusive use, and one adapted to no other kind of vehicle. It seems reasonable to say, therefore, that the case cannot be allowed to turn simply on the question whether the defendant's roadway is likely to be used by the bicycle, as that is not the controlling factor in the case of the electric road, which is forbidden, or the pedestrian, who is not forbidden, to travel any part of the road without paying toll. The bicycle is not subject to the payment of toll by the strict letter of [678] the act. Neither is the motor cycle. Yet we incline to the opinion that payment of toll by the driver of the latter is within the spirit, while such payment by the user of the former is not, because of the apparent intention to confine the payment of toll to those who do not depend upon their own powers of locomotion for the propulsion of the vehicle used. This view seems to receive significant support in the fact that we find few cases where the question has arisen. The bicycle has been used as a road machine for a quarter of a century, and we cannot conceive of the users submitting to a general practice of charging toll without protest that would have led to an adjudication of the question. Furthermore, we have never heard that it was the practice of the companies to charge toll, and we have reason to believe that this company is no exception, but that the cause is here to ascertain whether the company may safely provide exceptional facilities for wheelmen, with the expectation of collecting toll.

But two cases where similar questions have arisen are cited by counsel. In Geiger v. Perkiomen etc. Tp. Road, 167 Pa. St. 582, a bicycle was held subject to toll, as a two-wheeled carriage, under a statute which gave the right to collect toll from "all and every person and persons using the said road, ... and to stop any person driving any sulky, chaise, phaeton, cart, wagon, sleigh, sled, or other carriage of burthen or pleasure, ... and for every other carriage of pleasure, under whatever name it may go, the like sums, according to the number of wheels and horses drawing the same": Act March 25, 1805, sec. 11.

The court held that this was a "carriage of burthen or pleasure"; and what is more significant, from the standpoint from which we view the case, is the view taken of the word "horses" as used in the statute. It is said that "the method of computation by wheels and horses is not the power to collect toll, which is expressly given. That [679] is a mere limitation on the power. The demand must not exceed the sum specified for the animals

and vehicles enumerated." This reasoning is at variance with our view, and it seems to us that it is at variance with immunity from tolls on the part of the pedestrian, who, as said of the bicyclist in that case, "has the same right as owners of carriages to insist that the highway shall be maintained in a reasonably safe condition of repair." A Pennsylvania statute is cited giving the bicyclist the right to use the highway, the same as any other vehicle, but we think it was declaratory of the common law merely; and, if it were not, it could hardly be held to affect the rights of a turnpike company under a charter granted half a century before practical bicycles were invented.

This question arose in England under a statute which gave the right to collect tolls as follows: "For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-a-vis, barouche, phaeton, curricle, calash, chaise, chair, gig, whiskey, caravan, hearse, litter, or other such carriage, the sum of 6d.; for every horse, mule, or ass, laden or unladen, and not drawing, the sum of 2d.; and for every carriage of whatever description, and for whatever purpose, which should be drawn or impelled, or set or kept in motion, by steam, or any other power or agency than being drawn by any horse or horses, or other beast or beasts of draught, any sum not exceeding 5s.": 3 William IV, c. 55; Williams v. Ellis, L. R. 5 Q. B. Div. 175.

In a short opinion, the court held that a bicycle is not a carriage, within the meaning of the turnpike act that carriages there referred to must be carriages ejusdem generis with the carriages previously specified, which, as the act imports, were carriages propelled otherwise than by human agency. We should hesitate to say that the right to charge tolls was limited to conveyances ejusdem generis with those drawn by animals, which alone seem to be mentioned in our act. Indeed, the case cited from 103 Michigan may be plausibly said to have settled that question; but we see no reason for refusing to apply the doctrine [680] to the broader class of vehicles propelled by animals or some mechanical motor. It seems to us that this distinction will protect the plank-road companies from the use of their road by substitutes for those vehicles which the law contemplated should be charged for, and at the same time protect the pedestrian in his increased power of locomotion by the aid of the wheel.

This view accords with that of the learned circuit judge who tried the cause, and his judgment is affirmed.

Moore, J., concurred with Hooker, J.

Long, C. J., and Grant and Montgomery, JJ., concurred in the result.

BICYCLES ARE REGARDED AS VEHICLES: Note to Riepe v. Etting, 48 Am. St. Rep. 377; Thompson v. Dodge, 58 Minn. 555; 49 Am. St. Rep. 533; Myers v. Hinds, 110 Mich. 300; 64 Am. St. Rep. 345.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

STERNBERG *v.* WOLFF.

[56 NEW JERSEY EQUITY, 389.]

CORPORATIONS—RECEIVERS OF BECAUSE OF DISSENSIONS.—If, by reason of dissensions among the directors of a trading corporation, and their equal division and consequent inability to determine any question or adopt any resolution by a majority vote, it has become unable to carry on its business, a receiver should be appointed to take charge of, and manage, such business during the pendency of the suit.

INJUNCTION IMPOSING TERMS THAT THE COMPLAINANT SHOULD SUBMIT TO A LIKE INJUNCTION.—It is within the power of a court of chancery in granting an injunction to a suitor to impose terms to the effect that he be restrained from doing the same acts which his adversary is enjoined from doing.

AN INJUNCTION SHOULD NOT ISSUE against the directors or officers of a corporation, the effect of which must be to suspend its business and make its conduct in the ordinary methods impossible. It is better, if the business cannot otherwise be carried on, owing to dissensions among the directors, that a receiver should be appointed.

Robert H. McCarter and Louis Hood, for Lazar Sternberg et al.

Riker & Riker and Charles D. Thompson, for David Wolff et al.

300 DEPUE, J. On the 25th of July, 1892, Sternberg, Wolff, and Misch became incorporated under the general corporation act under the name of L. Sternberg & Co., with a capital stock of one hundred thousand dollars, divided into one thousand shares, the par value of which was one hundred dollars each. The object for which this company was incorporated was to carry on a general merchandise business.

At a meeting of the stockholders on the 26th of August, 1897, Sternberg was the owner of four hundred and ninety-nine shares; Rosa Sternberg, his wife, of one share; David Wolff one share, and Rosa Wolff, his wife, four hundred and ninety-nine shares; the situation being that one-half of the capital stock was held by Sternberg and his wife, and the other half by Wolff and his wife. At this meeting the by-laws were amended so that the board of directors should consist of four members, and the whole number of directors should be necessary to a quorum, and the four persons above named were elected directors; Lazar Sternberg was elected president, David Wolff being secretary and treasurer. Among the by-laws was the provision that Lazar Sternberg and David Wolff, and Henry Kern, the general superintendent, should not be subject to discharge or reduction of salary by any officer of the company, or by the board of directors, without the consent in writing of the majority in interest of the stockholders; that other employés might be discharged either by Lazar Sternberg or David Wolff, and new employés should be employed only with the concurrence of both Lazar Sternberg and David Wolff, unless otherwise ordered by the board of directors.

391 It is unnecessary to go into particulars; it is sufficient to say that after the meeting last referred to Sternberg and his wife, as the one party, were the owners of one-half of the capital stock of the company, and Wolff and his wife the owners of the other half. Difficulties and dissensions arose between these four persons, in which Sternberg and his wife, the one-half in number of the board of directors, were engaged on the one side, and Wolff and his wife, the other half of the board of directors, were engaged on the other side. By reason of these dissensions the management of the business by the board of directors was in a deadlock, although the company was largely engaged in the conduct of the business for which it was incorporated. In consequence of the disputes between these parties, in October, 1897, Sternberg and his wife filed a bill in the court of chancery against Wolff to restrain him, among other things, from exercising the duties of treasurer and from discharging employés, or interfering with the regular business of the company for his own personal ends, with a further prayer that if necessary a receiver might be appointed to take charge of said company and manage the same pending the decision of this suit. No answer had been filed by Wolff when the hearing on this application was had before the vice-chancellor, but Wolff in his affidavit states that he believes

that the safety of the business demands the appointment of a receiver at least during the pendency of the litigation, and until an adjustment of the interests of the stockholders can be arrived at. Rosa Wolff was not a party to the bill, but she made an affidavit stating that she was the owner of half of the company's stock, and claiming that it was necessary for the protection of her interests that a receiver should be appointed for the corporation at least during the pendency of this litigation, and until the rights and powers of the officers and stockholders of the company shall have been adjusted and fixed under the order of the court.

This matter coming on for hearing before the vice-chancellor on bill, affidavits, and counter-affidavits, the vice-chancellor advised an order dated November 6, 1897, denying the application for a receiver, but ordering that, pending this suit, an injunction [392] do issue enjoining David Wolff, the defendant herein, from drawing any promissory notes or checks of the company, or on behalf thereof, except for ascertained debts due by the said company, or from drawing any check to the order of himself, except for salary due him, after deducting all charges against him for rent and goods; the disputed items of two hundred and six dollars and one hundred and forty dollars for banquet and stable account, respectively, not to be included in the ascertainment of said changes against him, the same being reserved until the final hearing of the case; and from discharging employés, except for cause, and that by the permission of the court, or from employing any new employés without the permission of the court, and from making or procuring to be made any list of the customers of said company; and from continuing to act as treasurer of the said company, unless within ten days from the date hereof he should file a bond in the penal sum of twenty thousand dollars, conditioned for the faithful performance of his duties as treasurer of the defendant corporation; and that the complainant Lazar Sternberg be likewise enjoined from drawing any promissory notes or checks of the company, or on behalf thereof, except for ascertained debts due by the said company; or from drawing any check to the order of himself, except for salary due him after deducting all charges against him for rent and goods; and from discharging employés, except for cause, by the permission of the court, or from employing any new employés without the permission of the court; and from making or procuring to be made, any list of the customers of said company; and from inducing the employés of the company to fail to pay proper respect to

the defendant and other officers of the company, and from inducing them to refuse obedience to their orders.

The vice-chancellor, in granting the injunction against Sternberg, seems to have gone upon the ground that the mutuality of the injunction was necessary to protect the interests of all the stockholders in the affairs of the company pendente lite.

It is within the power of the court of chancery, in granting to a suitor an injunction, to impose terms, and I have no doubt that the terms imposed in this case were such as it was in the [393] power of the court to impose, enjoining a defendant on the terms that an injunction relating to the same subject matter should go against the complainant.

The business of the company, at the time these orders were made, in manufacturing and selling clothing, was very large, the company having its main place of business in the city of Newark and eleven branches located elsewhere in the state, and it is undeniable that the pendency of these injunction orders seriously interferes with the business of the company; and, in the judgment of this court, it is wholly impracticable for the court of chancery to take upon itself the control of the details of the business of this company in conformity with this injunction, as well as quite impossible that the business of the company should be profitably carried on without those who are engaged in the management of the business being allowed to manage and conduct the same upon business methods, rather than by the methods proposed by these injunction orders.

But it is apparent from the facts that appear in the bill and affidavits that some relief pending this litigation should be afforded in these proceedings. The two parties to the controversy —Sternberg and his wife on the one side and Wolff and his wife on the other side—are the owners each of one-half of the capital stock. These four individuals are directors of the company, and, by the by-laws, the whole number is necessary to make a quorum for the transaction of business. The dissensions between these two parties—Sternberg and his wife on one side and Wolff and his wife on the other side—have brought the affairs of this company to a deadlock, so far as any corporate action by the board of directors is concerned.

It may be assumed that the court of chancery has no jurisdiction to dissolve a solvent corporation and distribute its assets on the ground that the business of the corporation is improperly conducted by its board of directors, even though such mismanagement be with the concurrence of a majority of the stock-

holders; but the jurisdiction of the court of chancery to control the business of a company, especially a trading company, pending a litigation over the management and conduct of its business, must [394] necessarily exist, and we think, pending a litigation such as that which is inaugurated by the proceedings in this case, a receiver may be appointed. Corporations such as the one now before us are mere trading companies, with a corporate organization for the convenience of conducting the business for which they were incorporated. Such a corporation has not the qualities of corporations created for public purposes. No reason appears why, in the matter of the control and conduct of its business, the corporation and its officers should not be within the control of the court of chancery to an extent corresponding with the control of that court over the business of a mere partnership.

The cases establish the power of the court in virtue of its general jurisdiction to preserve the subject of litigation pendente lite, though it may relate to the affairs of a trading company in form organized as a corporation. The two cases cited by the vice-chancellor in his second opinion are to that effect: Featherstone v. Cooke, Trades Auxiliary Co. v. Vickers, L. R. 16 Eq. Cas. 298, 303. In the first case, the complications in the affairs of the company arose out of a division in the board of directors, which made it absolutely impossible that the affairs of the company could be conducted with advantage. Vice-Chancellor Malins in that case says: "With regard to private partnerships, nothing is of more frequent occurrence than the quarrels of partners. If partners quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go on with advantage, it is every day's practice for the court to interfere by injunction and appoint a receiver if necessary. With regard to public companies, I apprehend the same principle is applicable. If a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of private partnerships, it is clearly within the rule of this court to interfere, and it will do so." The court in that case intervened by injunction and receiver simply to protect the property of the company, to continue, however, no longer than until a governing body was duly appointed. In the latter case, the dissension was also in the board of directors, [395] one set of which closed the office doors of the company's building, and the other set, with the aid of some laborers, broke open

the doors with crowbars and forced the office open. The prayer of the bill was for the appointment of a receiver until the proper board of directors was constituted. The vice-chancellor placed the affairs of the company in the hands of a receiver pendente lite until a new governing body was appointed. The vice-chancellor's opinion states the principle to be that the court will not interfere with the internal affairs of joint stock companies unless they are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested; in such a case the court will interfere, but only for a limited time, and to as small an extent as possible.

Chancellor Runyon, in Einstein v. Rosenfeld, 38 N. J. Eq. 309, after citing the two cases already cited, did not dissent from the ruling of the vice-chancellor in those cases. He denied the appointment of a receiver on the ground that the business of the company was being carried on, and that there was no need of immediate interference on the part of the court for the protection of the property or business interests of the company. In Archer v. American Water Works, 50 N. J. Eq. 33, the present chancellor, after referring to the three cases above cited, said that: "If the present directors of the company continue their dissensions so that the affairs of the company are not speedily attended to, upon a proper application I will care for the property, pending the determination of the suit, through the instrumentality of a receiver. Such action will be supported by precedents and authority. My interference, however, by injunction and receiver, will be limited to the imperative requirements of the present emergency." In an earlier case Vice-Chancellor Van Fleet said: "The power of this court to appoint a receiver of a corporation, either because it has no properly constituted governing body or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be [396] regarded as settled, but I think it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution and only for such time and to such an extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders": Edison v. Edison United Phonograph Co., 52 N. J. Eq. 620, 625, 626. In Fougeray v. Cord, 50 N. J. Eq. 185, Laurel Springs Land Co. v. Fougeray, 50 N. J. Eq. 756, this

court did not deny the power of the court of chancery to appoint a receiver pendente lite for the management of the affairs of an incorporated company organized for the purposes of trade. The ruling of this court was, that "the disturbance of corporate functions incident to a receivership are extreme powers, and may not be decreed by a court of equity when the specific acts complained of are capable of redress and complete restitution, and those apprehended fall within the ordinary jurisdiction by injunction." The order of the court of chancery appointing a receiver in that case was set aside by this court, not on the ground of a want of power in the court of chancery to resort to the proposed mode of relief, but on the ground that, in the judgment of this court, that power was in that instance improperly exercised.

That some redress should have been afforded under the bill filed in this case is apparent from the facts disclosed in the bill and affidavits. That the vice-chancellor granted injunctions which so completely interfered with the affairs of the company as to make the conduct of its business by its officers in ordinary business methods impossible, and assumed the administration of its business affairs to such an extent as to be utterly impracticable, affords a convincing argument for such relief as is practicable through the intervention of the court of chancery under the circumstances. Such relief, we think, could be afforded only by the appointment of a receiver pendente lite.

On both appeals the injunction orders should be vacated, and the record should be remitted to the court of chancery, to be proceeded with in accordance with these views.

RECEIVERS—APPOINTMENT—DISSENSIONS IN CORPORATIONS.—When a court appoints a receiver of a corporation on account of dissensions in the governing body, it will interfere for a limited time only, and to as small an extent as possible: Wallace v. Pierce-Wallace Pub. Co., 101 Iowa, 313; 63 Am. St. Rep. 389. See monographic note to Cortelyeu v. Hathaway, 64 Am. Dec. 485, 486.

INJUNCTIONS—ISSUE OF, UPON CONDITION.—Where conditions remain to be performed by both parties to the litigation, an injunction should not be granted which absolutely binds one person to perform his part of the conditions, while it leaves the other party free. The party in whose favor the injunction is granted should first be required to give a secured bond that he will perform his part of the conditions: Macon etc. R. R. Co. v. Gibson, 85 Ga. 1; 21 Am. St. Rep. 135, and note.

WITHROW *v.* WARNER.

[56 NEW JERSEY EQUITY, 795.]

FRAUDULENT CONVEYANCES.—Where it is claimed that a voluntary conveyance is fraudulent as against creditors, but the evidence is not sufficient to justify the court in avoiding it absolutely, but is adequate to excite a well-grounded suspicion respecting the adequacy of the consideration and the fairness of the transaction, the conveyance will be permitted to stand only as security for the consideration actually paid.

David J. Pancoast, for the appellant.

Howard Carrow, for the respondent.

802 COLLINS, J. The burden of complaint of the appellant is, that while disclaiming any right to presume fraud on his part, and conceding that there is no evidence that he knew of his grantors' fraudulent intentions, the vice-chancellor nevertheless proceeds to deprive him of the fruits of his bargain.

The concession, if warranted, had weight only as against an absolute avoiding of the deed. To work such a result it is necessary that it should appear that the grantee had knowledge of or participated in the fraudulent intent of the grantor; but where, in such a suit as is involved in this appeal, the evidence, though not sufficient to induce the court to avoid the deed absolutely on the ground of fraud, is sufficient to excite a well-grounded suspicion as to the adequacy of the consideration and 803 the fairness of the transaction, the court will permit the conveyance to stand only as security for the consideration actually given.

Such was declared to be the doctrine of courts of equity by Mr. Justice Depue in the case of Muirheid v. Smith, 35 N. J. Eq. 303, 312, decided in this court. In that case the majority of the court had no doubt of the adequacy of consideration or of the bona fides of the deed; but the doctrine so declared in the opinion read for the minority was not in any way challenged in the opinion read for the court. On the contrary, it was impliedly, if not expressly, upheld. It had been enunciated in almost the same terms by Chancellor Kent in Boyd v. Dunlap, 1 Johns. Ch. 478, and approved by this court in Demarest v. Terhune, 18 N. J. Eq. 532. The only essential difference between the case last cited and that now before us is, that in the one the consideration of the deed held to be a mortgage was an antecedent debt, while in the other it is a money payment. This difference does not affect the principle involved. The doctrine declared

was, in this court, in the case of Winans v. Graves, 43 N. J. Eq. 263, 276, held applicable to a new consideration. In Demarest v. Terhune, 18 N. J. Eq. 532, it was adjudged that when the consideration of a conveyance made by a debtor in failing circumstances is shown to be inadequate, the burden of proving bona fides is thrown on the grantee, and that if the honesty of the conveyance is left in doubt, upon the evidence, the sale will be set aside on equitable terms.

Upon the facts proved in this case the appellant has no ground to complaint of a decree securing him, as by way of mortgage, the sum he claims to have paid for the property.

It has been suggested that the frame of the bill is not adapted to such a decree. The bill is not quite accurately stated in the opinion below. It simply charges that to prevent the complainant from collecting his debt the conveyances and mortgage recited were given; that "no consideration whatever was paid or exists or did exist for any of the said conveyances or mortgage," and that the grantor remains in possession. It prays that "the said fraudulent conveyances and mortgage may be set aside and declared null and void," and for other relief.

804 In Winans v. Graves, 43 N. J. Eq. 263, it was assumed that such a bill would not warrant the relief there, as in this case, deemed appropriate, although it was intimated that proper amendments might be made in this court; but it evidently was not noticed by the learned judge who wrote the opinion in that case that in Demarest v. Terhune, 18 N. J. Eq. 532, it had been directly decided that a like bill was sufficient for the purpose. Chief Justice Beasley, in delivering the opinion of this court, said: "Nor is the frame of the bill inapplicable to this aspect of the case. It proceeds upon the point of a conveyance without consideration, and which was, on that account, a fraud upon creditors. The case laid, therefore, is partially proved; the conveyance, though not wholly, is in some degree voluntary, and is thus far constructively a fraud, delaying, and if not set aside or controlled, defeating creditors. I do not, consequently, find any difficulty arising from the structure of the pleadings in granting relief in the form indicated," and it was decreed that the deed should stand as a mortgage.

The relief, therefore, intended by the learned vice-chancellor in the present case should be effectuated, but by inadvertence the decree has been made too broad. It directs a conveyance to the complainant upon payment of Mr. Withrow's claim. The

utmost that complainant could ask was a sale of the premises to pay, first, the Withrow claim, and then his judgment.

Let the decree be reversed, and the cause be remitted with instructions in conformity with this opinion.

No costs will be allowed in this court.

FRAUDULENT CONVEYANCES — VOLUNTARY CONVEYANCES—WHEN VOID.—The fact that a transfer was made upon an inadequate consideration is doubtless one which may be, and ought to be, considered by a court or jury in determining whether or not the transfer was made with intent to defraud creditors of the grantor, and if, in connection with other circumstances, it satisfies them of such fraudulent intent, the transfer should be disregarded: See monographic note to Hagerman v. Buchanan, 14 Am. St. Rep. 739, on voluntary conveyances; also, monographic note to Jenkins v. Clement, 14 Am. Dec. 703-709.

CASES

IN THE

SUPREME COURT

OF

OREGON.

FLANDERS *v.* AUMACK.

[32 OREGON, 19.]

EXECUTION SALES.—REDEMPTION BY THE JUDGMENT DEBTOR of his lands sold under execution reinstates the lien of the judgment for any balance remaining unpaid, and subjects the lands to a resale to satisfy such balance.

EXECUTION SALES.—REDEMPTION BY THE GRANTEE OF THE JUDGMENT DEBTOR from an execution sale of land bid in for less than the judgment reinstates the lien for the unpaid balance, and a resale of the land may be had to satisfy such balance, if the judgment lien has attached at the time that the transfer is made.

Action by J. C. Flanders, against L. N. Aumack, administrator of the estate of E. S. Rash, deceased, and the sheriff to restrain an execution sale of certain lots of land which were at one time owned by W. G. Jenne and wife, against whom E. S. Rash recovered a judgment. Subsequently Rash bid in the property at execution sale for less than the amount due on the judgment, and afterward Jenne and wife conveyed said property to said Flanders, who then redeemed it from the sale. An alias execution afterward issued upon said judgment for the balance due thereon. Hence this suit. Judgment for plaintiff and the defendants appealed.

Watson, Beekman & Watson, for the appellants.

J. C. Flanders, and Williams, Wood & Linthicum, for the respondent.

20 WOLVERTON, J. The issues presented by the record involve a question as to the effect to be given the execution sale

and redemption therefrom by the successor in interest of the judgment debtors. Plaintiff contends that it extinguished absolutely and effectually the lien of the judgment upon the premises in question, while the defendants insist that the redemption had the effect to reinstate the lien, and subject the property to a second sale for the unpaid balance of the judgment after the application thereto of the amount bid at the first sale. The identical [21] question has been decided in Settlemire v. Newsome, 10 Or. 446, adversely to plaintiff's contention, but it is thought that decision was overruled in Willis v. Miller, 23 Or. 352; and it is strongly insisted that, if the latter does not suffice for that purpose, it should be now overruled, as unsound in principle and unsupported by the great weight of authority.

The authorities are practically uniform that a redemption by the judgment debtor of his lands sold under execution will reinstate the lien of the judgment for any balance remaining unpaid, and subject the lands to a resale to satisfy such balance: State v. Sherill, 34 Ind. 57; Allen v. McGaughey, 31 Ark. 253, 260; Bodine v. Moore, 18 N. Y. 347; Wood v. Colvin, 5 Hill, 228. Such was and is the doctrine in Iowa, and it was early held that the same result would attend a redemption by his successor in interest: See Crosby v. Elkader Lodge, 16 Iowa, 399; Hays v. Thode, 18 Iowa, 51; Rorer on Judicial Sales, secs. 955-959. But in Clayton v. Ellis, 50 Iowa, 590, a more recent case from that state, Seevers, J., says: "If redemption of the whole or any parcel is made by the debtor, the judgment, to the extent of the balance due thereon, would constitute a lien on the premises in his hands, and they might again be sold on execution based on said judgment. But we see no reason why the debtor may not sell his right of redemption, and his vendee redeem by paying the amount of the bid, interest, and costs." This result, it was thought, followed from the conclusion reached in that and [22] prior cases (Hays v. Thode, 18 Iowa, 51, and Tuttle v. Dewey, 44 Iowa, 306), to the effect that the lien of a judgment under which real property has been sold and bid in by the judgment creditor for less than the amount due thereon is devested as to the unpaid balance; but the only question presented in that case was whether land sold under execution in pursuance of a decree of foreclosure of a mortgage, and purchased by the execution creditor for less than the amount of the decree, could be redeemed by the holder of the deficiency judgment, who was an heir of the purchaser; and it was held that it could not, and this upon the ground that his lien was ex-

tinguished by the sale. What was said beyond this was not necessary to a decision of the case. However, whether it be regarded as dicta or not, it has come to be regarded as settled law in that state. The decision has been approved in Hayden v. Smith, 58 Iowa, 285, and Todd v. Davey, 60 Iowa, 534. And in Moody v. Funk, 82 Iowa, 1, 31 Am. St. Rep. 455, Robinson, J., says: "That the lien of the judgment would not be devested 'as to all persons' by the sale was held, in effect, in Harms v. Palmer, 73 Iowa, 446, 5 Am. St. Rep. 691; Campbell v. Maginnis, 70 Iowa, 589; Peckenbaugh v. Cook, 61 Iowa, 478, and other cases; for it was said in the cases cited that, if the judgment debtor redeem, the land redeemed would become subject to the lien of the unpaid portion of the judgment. But there is a marked difference between the case of a redemption [23] by the judgment debtor and that of a redemption by his grantee. If his grantee redeem, the execution creditor has no right to complain." The earlier cases in that state may therefore be considered as overruled and no longer controlling. Mr. Freeman is of the opinion that the lien is removed by the sale, and that, while it may attach after redemption as to newly acquired property for any deficiency, it is not restored as of its original date: 2 Freeman on Executions, sec. 321. In Seligman v. Laubheimer, 58 Ill. 124, it is held that under the Illinois statute a redemption by the grantee of the mortgagor, who was also a junior mortgage creditor, from a sale under a decree in a suit instituted by the prior mortgagee, foreclosing both mortgages, made for less than the amount of the senior mortgage, did not restore the lien of such mortgage for the unpaid balance, but that the redemptioner took it devested of any lien arising therefrom. These latter may be classed as in support of respondent's contention, but Simpson v. Castle, 52 Cal. 644, does not aid him, as it was rendered in view of a very different statute.

Other authorities maintain the contrary doctrine. In Titus v. Lewis, 3 Barb. 70, one Graves recovered a judgment against James Whitcomb. Execution was issued, and the lands of Whitcomb sold, and bid in by Titus for less than the judgment. Subsequently, James Whitcomb conveyed to Ansen Whitcomb, who redeemed from the sale by paying the amount of the bid and costs. Thereupon a resale of the same premises was had to satisfy the unpaid [24] balance of the judgment, and the title under this latter sale was upheld. Under a statute which provides that, "upon such payment being made by any person so entitled to redeem any real estate so sold, the sale of the prem-

ises so redeemed, and the certificates of such sale shall be null and void," Gridley, J., speaking for the court, says: "In this case, therefore, by the very terms of this enactment, the redemption under the first sale rendered that sale null and void; and, by necessary consequence, there having been no sale in law, there was no extingishment of the judgment lien upon the premises. The judgment was merely paid and satisfied pro tanto, but remained a valid lien for the unpaid balance." Wood v. Colvin, 5 Hill, 228, is cited and was regarded as an authority in point, although in that case the redemption was made by the judgment debtor. In Rutherford v. Newman, 8 Minn. 47, 82 Am. Dec. 122, it is held that a redemption by the successor in interest of the judgment debtor terminates the sale, and applies the proceeds as a pro tanto payment on the judgment, leaving the estate in the hands of such redemptioner in the same condition in which it would have been had the redemption been made by the judgment debtor himself. Warren v. Fish, 7 Minn. 432, and Standish v. Vosberg, 27 Minn. 175, are to the same effect. In Indiana it is held that a redemption by one having a conveyance from the judgment debtor of real estate previously sold at sheriff's sale annuls the sale, and restores the property to the position it occupied before the sale with the judgment lien or [25] liens reinstated for any sums remaining unpaid: Cauthorn v. Indianapolis etc. R. R. Co., 58 Ind. 14. And in Green v. Stobo, 118 Ind. 332, a like conclusion was reached, where an heir to the judgment debtor redeemed: See, also, Hervey v. Krost, 116 Ind. 268, and Goddard v. Renner, 57 Ind. 532. The case of Porter v. Pittsburg Steel Company, 122 U. S. 267, is in harmony with the doctrine of the Indiana courts.

Upon principle, it is difficult to see wherein the rights of a successor in interest redeeming are to be distinguished from those of the judgment debtor himself. The statute gives the right of redemption to the judgment debtor or successor in interest, but declares that, when the judgment debtor shall redeem, the effect of the sale shall terminate, and he shall be restored to his estate. A conveyance by the debtor can confer no greater rights than he himself had. It cannot disencumber the property, nor give a better or superior title. The successor is not a bona fide purchaser for value, but simply occupies the shoes of his predecessor, with no new or enlarged rights or privileges, and can neither exercise nor enjoy any that the judgment debtor did not possess or could not have enjoyed. The effect of a sale under execution is to suspend, but not to devest,

the lien of the judgment, as it suspends all subsequent liens until redemption is made, but a sheriff's deed cuts them off altogether. During the interim between the sale and the deed, the rights of the parties interested [26] are measured by the statute. The sale is inchoate, and does not transfer title until consummated by the execution and delivery of the deed in due course of law. If subsequent lienors, whether by judgment, decree, or mortgage, redeem, the course of the sale is not thereby impeded or precluded, but finally culminates in a deed as if no redemption was had by any one, and the deed puts an end to the lien of the judgment or decree under which the sale was made, and all other liens subsequently acquired. But a redemption by the judgment debtor has a very different effect. It terminates the sale, and restores the estate. The sheriff's duties are at an end, and he can proceed no further. And such is the effect of a redemption by his successor in interest. The statute has provided for redemption by but two classes of persons—the judgment debtor and his successor in interest, and creditors having liens, etc. A redemption by the latter class is with a purpose of securing a sheriff's deed in pursuance of the sale, and a redemption by the former is inimical to the sale, and puts an end to it; and the effect cannot be different whether the judgment debtor or his successor in interest redeem. The lien of the judgment under which the sale proceeded, if only partially satisfied, is not devested or eradicated, but is simply suspended, as are the liens of all creditors having subsequent judgments, decrees, or mortgages, pending the sale. If the sale is perfected either to the purchaser or through the redemption by subsequent lienors, they are all swept away; [27] but if redemption is had by the judgment debtor or his successor, they all survive or are reinstated as though no sale had been had. This must be said of the subsequent liens, and it should be true of the lien of the judgment under which the sale was effected; else, if it only took effect as of the date of redemption, subsequent liens would become superior and entitled to prior payment upon a resale. Mr. Justice Blatchford, when he rendered the opinion in Porter v. Steel Company, 122 U. S. 267, evidently entertained a like view, for he says: "The redemption was not made by the judgment debtor, so as to vacate the sale and reinstate the lien for the balance of the judgment which the purchase money of the sale did not pay." So with Mitchell, J., in Hervey v. Krost, 116 Ind. 268. He says: "An examination of the statute will make it apparent that the right to make a statutory

redemption is confined to three classes of persons: 1. The owner or part owner, his executor or administrator, under the order of the court, or his heirs or devisees, or any person claiming a legal or equitable title under him or them; 2. Any judgment creditor; and 3. Any person having a lien, otherwise than by judgment. It is only in case of redemption by persons embraced in the first class that the sale is vacated, and the real estate again subjected to the lien of the judgment, and to resale as if no sale had been made." For additional authorities bearing more or less upon the views here entertained, see 20 Am. & Eng. [28] Ency. of Law, 1st ed., 639; Bodine v. Moore, 18 N. Y. 347; Livingstone v. Arnoux, 56 N. Y. 507; Phyfe v. Riley, 15 Wend. 248; 30 Am. Dec. 55; Catlin v. Jackson, 8 Johns. 520; Cartwright v. Savage, 5 Or. 397; Dray v. Dray, 21 Or. 59-67.

These latter authorities lead to the conclusion that a redemption by the grantee of the judgment debtor from an execution sale of real property, bid in for less than the judgment, applies the amount bid pro tanto in payment of such judgment, terminates the sale, restores him to his estate, and restores or reinstates the lien for the unpaid balance, and a resale of the property may be had to satisfy the same. This we think to be the better rule and doctrine, and therefore approve Settlemire v. Newsome, 10 Or. 446. Nor does Willis v. Miller, 23 Or. 352, contravene the rule, and was not designed nor intended to overrule Settlemire v. Newsome, 10 Or. 446, or modify it in any particular. The facts in Willis v. Miller, 23 Or. 352, were that one Phipps, being the owner of certain real property, mortgaged it to Humphrey & Flint, and two days later conveyed to Willis. Humphrey & Flint subsequently obtained a decree of foreclosure directing a sale of the premises to satisfy the same, with judgment over against Phipps for any deficiency that might remain after the sale and application of the proceeds. A sale was had in pursuance of the decree, and a deficiency remained. Willis redeemed, and, an execution having been issued upon the deficiency judgment, and a levy made by virtue thereof upon the same premises, a [29] resale was enjoined. The deficiency judgment was against Phipps alone, and therefore never became a general lien against the land in the hands of Willis. Hence it was held that the redemption by Willis did not affect the judgment in any way, and that, by the sale under the decree, the mortgagees had exhausted the remedy afforded them by virtue of their mortgage contract. A mortgage is a specific lien,

which attaches by virtue of the contract of the parties concerned; but the lien of a judgment is general, and attaches by operation of law, as a sequence of its rendition. Foreclosure is a remedy by which the property covered by the mortgage may be subjected to sale for the payment of the demand for which the mortgage stands as security, and, when the decree is had and the property sold to satisfy it, the mortgagee has obtained all he contracted for; but, if there is also a personal decree against the mortgage debtor, this becomes, from the date of its docketing, a general lien upon his real property, as in case of a judgment; and, if a deficiency remains after the application of the proceeds of the sale of the lands covered by the mortgage, the decree may be enforced by execution, as in ordinary cases: Hill's Annotated Laws, sec. 417, subd. 2. The resale does not take place under the order for the sale of the specific property covered by the mortgage lien, for that has been exhausted, but under the personal decree which remains as a deficiency decree against the mortgage debtor after the application of the proceeds arising under the order of sale; and a redemption [30] will not reinstate the specific mortgage lien, while it will the general lien acquired by the personal decree. This distinction is clear, and is bottomed both upon principle and authority. The redemption is from the sale, and not from the mortgage; and if the lien of the personal decree has never attached, by reason of the mortgagor not having the fee of the property at the time it was rendered, there never existed any lien to be reinstated against his successor in interest, who purchased prior to the decree. Ogle v. Koerner, 140 Ill. 170, fully sustains this view. For authorities other than those cited in the opinion, see Standish v. Vosberg, 27 Minn. 175; Fowler v. Johnson, 26 Minn. 338; Campbell v. Maginnis, 70 Iowa, 589; Harms v. Palmer, 61 Iowa, 483; Harms v. Palmer, 73 Iowa, 446; 5 Am. St. Rep. 691; Escher v. Simmons, 54 Iowa, 269, 275. The decree of the court below will be reversed, and one entered here dismissing the complaint.

Execution Sales—Effect of Redemption From.

The doctrine of the principal case—namely, that the redemption of land sold under execution by a purchaser from the execution debtor after the execution sale reinstates the lien of the judgment for the balance remaining due thereon—is, perhaps, sustained by the weight of authority, though there are well-considered cases to the contrary. In the early case of Titus v. Lewis, 3 Barb. 70, it was decided that if, after the sale of lands on an execution for less

than the sum due upon the judgment, they were redeemed by the grantee of the judgment debtor, they might be resold by the sheriff for the balance remaining due thereon. In such case, the judgment is merely satisfied pro tanto by the redemption and remains a valid lien upon the premises for the unpaid balance. This case was decided upon the authority of Wood v. Colvin, 5 Hill, 228, wherein the court held that if lands were sold under execution and bid in by a third person for less than the amount of the judgment, and subsequently redeemed by the judgment debtor, they might be resold on the same execution for the balance remaining due, although the return day had passed before the redemption took place. And again, in Bodine v. Moore, 18 N. Y. 347, it was decided that the effect of a redemption by the judgment debtor of land sold under execution is to restore a junior judgment, under which the sale was also had, but which was not reached in the application of the proceeds to the same lien which it had before the sale.

Redemption by the judgment debtor or his successor in interest destroys the effect of the sheriff's sale, as such, and applies the money realized thereby as a payment upon the judgment, or other lien upon which the property was sold. Such redemption may be made without paying off prior liens, and all liens prior or subsequent to the one from which the property is redeemed remain unimpaired, except that the money paid on the sale or redemption operates as a payment pro tanto of the judgment: Rutherford v. Newman, 8 Minn. 47; 82 Am. Dec. 122.

The courts of the state of Oregon have always sustained the rule that lands sold on an execution for an amount less than the judgment debt and redeemed by the grantee of the judgment debtor may be sold a second time for the balance due on the judgment: Settlemire v. Newsome, 10 Or. 446. Redemption by the judgment debtor or his successor in interest of lands sold under execution restores the lien of the judgment in the same condition as if there had been no sale: Allen v. McGaughley, 31 Ark. 252. It was decided at an early date in Indiana that if land sold under execution for less than the amount of the judgment is redeemed by the judgment defendant, the priority of the lien of such judgment for the remainder of the amount thereof over other judgment liens continues, as if such sale had not been made: State v. Sherill, 34 Ind. 57. This ruling was followed in Goddard v. Renner, 57 Ind. 530, where it was held that when copartnership realty, which has been sold under execution issued on a judgment against the firm, is conveyed by a member thereof to a grantee who redeems from such sale such redemption is a voluntary payment in which the grantee is not protected, and the land may then be again sold under the execution to satisfy any unpaid balance remaining on such judgment. And if real estate is sold under execution and redeemed by an heir of the deceased judgment debtor, the sale is thereby vacated, the lien of the judgment reinstated, and the land is again subject to sale to satisfy any unpaid balance of the judgment: Green v. Strobo, 118 Ind. 332.

And in Hervey v. Krost, 116 Ind. 268-272, it was said that when

property is redeemed by any person falling within the description of those designated in the statute, "the effect of the redemption is to annul or vacate the sale, and the judgment upon which the sale was made, so far as it remains unsatisfied by the bid, again becomes a lien upon the land, and is reinstated to its former position: Goddard v. Renner, 57 Ind. 532; State v. Sherill, 34 Ind. 57; Bodine v. Moore, 18 N. Y. 347. Accordingly, it has been held that a redemption by one who took a conveyance from the judgment debtor of real estate previously sold at sheriff's sale, or by one who purchased the property at sheriff's sale made subsequent to the sale redeemed from, simply annulled the first sale and restored the property to the position it occupied before the sale, with the judgment lien or liens reinstated, for any sums remaining unpaid: Cauthorne v. Indianapolis etc. R. R. Co., 58 Ind. 14."

In the case of Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267-281, which was a case on appeal from the United States circuit court for the district of Indiana, the court said that "the redemption was not made by the judgment debtor, so as to vacate the sale and reinstate the lien for the balance of the judgment which the purchase money of the sale did not pay. The redemption was made by another and a subsequent lienholder, who redeemed for his own benefit, and the benefit of those for whom he was trustee." In Iowa, also, the earlier cases maintained that if the judgment debtor or his grantee redeemed land which has been sold in partial satisfaction of a judgment, which was a subsisting lien thereon, it again became liable to levy and sale for the satisfaction of the unpaid balance of the judgment: Crosby v. Elkader Lodge, 16 Iowa, 399; Curtis v. Millard, 14 Iowa, 128; 81 Am. Dec. 460; Hays v. Thode, 18 Iowa, 52. Although it does not become so liable when the redemption is made by a lienholder: Hays v. Thode, 18 Iowa, 52. And the later Iowa cases also hold that if land is sold under execution in satisfaction in part only of the judgment, and the judgment debtor himself redeems from such sale, the balance of the judgment at once attaches as a lien upon the property, and it may be again sold to satisfy that portion of the judgment: Campbell v. Maginnis, 70 Iowa, 589; Peckenbaugh v. Cook, 61 Iowa, 477. In Clayton v. Ellis, 50 Iowa, 590, the supreme court of Iowa distinctly overruled Crosby v. Elkader Lodge, 16 Iowa, 399, and held that real estate which has been sold under execution in part satisfaction of a judgment and redeemed by the judgment debtor does not become again subject in his hands to the lien of the judgment for the unsatisfied balance due. In deciding this case the court found it impossible to reconcile the earlier Iowa cases and said: "Such being true, we are at liberty to adopt such a rule as is deemed to be the proper one under the statute, and we are of opinion that the better rule is, that the lien of the judgment as to the unsatisfied balance on the real estate sold is, as to all persons and in all cases, divested by the sale. This simplifies the law on this subject and uniformity is thereby attained, which is certainly desirable. If there remains a balance due on the judgment after the sale which constitutes a lien on the land sold, it is difficult to see how the debtor or his assignee could

avail himself of the benefit of the statute except by paying the whole of such balance before he could redeem the most insignificant parcel, for the statute makes no provision as to the apportionment of such balance on the several parcels. If redemption of the whole or any parcel is made by the debtor, the judgment, to the extent of the balance due thereon, would constitute a lien on the premises in his hands, and they might again be sold on execution based on such judgment. But we see no reason why the debtor may not sell his right of redemption, and his vendee redeem by paying the amount of the bid, interest, and costs. It should be conclusively presumed for the purpose of redemption that the purchaser bid therefor all that the property was worth to him. Whether, in case the judgment creditor is the purchaser and the judgment is not fully satisfied by the sale, he could issue another execution and sell the debtor's right of redemption, we do not determine."

In Escher v. Simmons, 54 Iowa, 269, it was held, on the authority of Clayton v. Ellis, 50 Iowa, 590, that a sale of land under mortgage foreclosure in satisfaction of an installment only of the mortgage debt exhausts the lien of the mortgage. This ruling was followed in Todd v. Davey, 60 Iowa, 532, where the court decided that where one has a vendor's lien on the land sold, but elects to foreclose the contract of sale, he cannot, after the land has been sold and bid in by him for a part only of the judgment and redeemed from the sale by the defendant, still claim to have a vendor's lien on the land for the balance of the unpaid purchase money. The rule in Iowa at the present time is that a redemption, by the mortgagor's grantee of property sold upon an execution based upon a decree of foreclosure for part of the debt, divests the property of the judgment lien for the remaining part of the mortgage debt, although, had the judgment debtor himself redeemed, the result must have been otherwise, and the liens of all unsatisfied judgments must have been reinstated. If a mortgagor, after a senior mortgage is foreclosed and after the right of a junior mortgagee to redeem from the foreclosure sale is barred by lapse of time, conveys his interest in the lands mortgaged, his grantee may redeem without removing such bar, and thus perfect in himself the title to the land sold, and such grantee will then hold the land discharged from the lien of the junior mortgage, and may maintain an action in equity to quiet his title as against such lien: Harris v. Palmer, 73 Iowa, 446; 5 Am. St. Rep. 691; Moody v. Funk, 82 Iowa, 1; 31 Am. St. Rep. 455.

Cases in other states also affirm, at least so far as the grantee of the judgment debtor is concerned, that the effect of redemption from an execution sale is to release or extinguish the lien of the judgment. Thus, in Boyce v. Wight, 2 Abb. (N. C.) 163, the view is expressed that when land sold under execution has been redeemed by the judgment debtor paying the purchase price and interest, the sale and certificate thereof become void, and one who becomes a grantee of the judgment debtor before the sale, though

after a recovery of the judgment, holds the title free from any lien or encumbrance by reason of such sale, purchase, and certificate. In Seligman v. Laubheimer, 58 Ill. 124, it is held that a redemption by the grantee of the mortgagee, who is also a junior mortgage creditor, from a sale under a decree in foreclosure in a suit instituted by the prior mortgagee, foreclosing both mortgages, made for less than the amount of the senior mortgage, does not restore the lien of such mortgage for the unpaid balance, and the redemptioner takes it divested of any lien arising therefrom. This case was followed in Ogle v. Koerner, 140 Ill. 170, wherein it was held that if redemption is made from a foreclosure sale of a mortgage by one primarily liable on the mortgage debt, the same property may again be resorted to for the payment of an unpaid balance due on the mortgage, but if redemption is made by a party not liable upon the mortgage, the mortgage lien having been exhausted, the property cannot be subjected a second time to the satisfaction of the same lien. Thus, if land is sold under a decree of foreclosure which finds the rights and priorities of the parties, the holder of a second mortgage lien, who is a party to the decree, or his assignee, may redeem from such sale by paying the amount bid at the sale, with interest, and by so doing he will be subrogated to the rights of the purchaser, and will take the land free from the lien of the senior mortgage. If, upon foreclosure of a mortgage, the mortgagee purchases the land for a sum less than the amount of the judgment, and dockets a judgment for the deficiency, the purchaser from the mortgagor of the land, pending the time for redemption, is entitled, as successor in interest, to redeem from the mortgagee without paying the amount of the deficiency: Simpson v. Castle, 52 Cal. 644; Black v. Gerichten, 58 Cal. 56.

A sale under foreclosure extinguishes the lien of the mortgage as to the land sold, and such lien can be restored only when the sale has been vacated by a redemption by the persons contemplated by the statute. Hence, a mortgagee or judgment lienholder after he has sold land upon an execution or decree cannot redeem from his own sale, in case it produces less than the whole amount of his judgment, and thereby restore the lien of the judgment and subject the property to a resale as if no previous sale had been made: Hervey v. Krost, 116 Ind. 269. An execution or judicial sale of property to satisfy a judgment or decree exhausts the power to sell such property thereunder, and a judgment creditor cannot, after redemption by a junior encumbrancer, resell it to enforce payment of the unsatisfied part of the judgment: Anderson v. Anderson, 129 Ind. 573; 28 Am. St. Rep. 211; Spraudel v. Houde, 54 Minn. 308.

One redeeming from an execution or mortgage sale is a purchaser for value of whatever interest he acquires by the redemption, as fully as if he had purchased the certificate of sale from the purchaser: Ahern v. Freeman, 46 Minn. 206; 24 Am. St. Rep. 206.

A purchaser of land at execution sale takes it subject only to redemption, and has such a right therein that he may question the right of a party to redeem who has lost such right by lapse of time: Robertson v. Moline etc. Co., 88 Iowa, 463.

The right of creditors to redeem from the purchaser of land at execution sale, or of one creditor to redeem from another, who has previously redeemed from the purchaser, cannot be cut off by a sale of the land by the judgment debtor, and such sale by the latter within the time allowed for redemption, without having previously redeemed himself, is, in effect, merely a sale of his equity of redemption: McClean v. Harris, 14 Lea, 510. A creditor redeeming need not pay liens held by the purchaser at execution or foreclosure sale subsequent to that on which the sale was had, and prior to that under which he redeems, if such purchaser has not, with respect to such subsequent liens, placed himself in line of redemption by complying with the statute: Pamperin v. Scanlan, 28 Minn. 345; Parke v. Hush, 29 Minn. 434; Ritchie v. Ege, 58 Minn. 291. A third judgment creditor can intercept a second in redeeming land from the execution sale of the first, and then the second can redeem only from the third: Hare v. Hall, 41 Ark. 372. A judgment creditor who has redeemed his debtor's land sold under execution, and obtained title thereto, may be compelled to submit to a redemption thereof, by a court of equity, by the debtor or his assignee, upon payment of the amount of his bid, with interest and costs, and cannot hold the land as security for another debt, although the creditor did not advance or have authority to advance his bid, as provided by statute: Ewing v. Cook, 85 Tenn. 332; 4 Am. St. Rep. 765. A creditor having two judgments acquires no interest against a creditor who has redeemed the property from the sale under a senior judgment, by a purchase of the same property at a sale under a junior judgment, made before the time expires for redemption under the senior judgment by the judgment debtor: Merry v. Bostwick, 13 Ill. 398; 54 Am. Dec. 434. A void judgment creditor redeeming land of the judgment debtor from a sale under a prior judgment, with the consent of the purchaser, and receiving a sheriff's deed therefor, obtains a good title: Hare v. Hall, 41 Ark. 372.

If the right and title of several defendants to certain premises are sold, and a creditor of one of such defendants redeems the right and title of such defendant, the deed to such redeeming creditor conveys only the title of the defendant which is thus redeemed: Neilson v. Neilson, 5 Barb. 565. And if land owned by two tenants in common is sold on foreclosure of a mortgage given by them, a sale under a redemption made by a judgment creditor of one of them passes the title of that one only: Fischer v. Eslaman, 68 Ill. 78; Erwin v. Schriver, 19 Johns 379. In California the doubtful rule has been announced by a divided court that the redemption by a judgment creditor of one cotenant entitles such creditor to a conveyance of the property of all of the cotenants: Eldridge v. Wright, 55 Cal. 531. A purchaser by whom redemption has been made is not entitled to possession on the ground that he has redeemed from a sale made upon a senior mortgage. His right as such redemptioner is not to the possession of the lands but a lien thereon for his redemption money and interest, which may be enforced by suit: Rice v. Pruett, 81 Ind. 230.

A judgment debtor whose lands have been sold under execution

may redeem from the purchaser without paying the amount of a prior judgment against him held by a partnership of which the purchaser is a member: Campbell v. Oakes, 68 Cal. 222. If a sale of land under execution is void for any reason, the redemptioner acquires no title, for his rights, like the purchaser's, are dependent upon a valid judgment, execution, and sale: Mulvey v. Carpenter, 78 Ill. 580; Johnson v. Baker, 38 Ill. 98; 87 Am. Dec. 293; Keeling v. Heard, 3 Head, 592. But a judgment creditor who redeems from a prior sale acquires a valid title to the land redeemed, though the judgment by virtue of which he acquired the right to redeem may be subsequently reversed: McLagan v. Brown, 11 Ill. 519. Redemption of land by a junior judgment creditor from a sale under a prior judgment, is not a satisfaction of the redeeming creditor's judgment, at law or in equity, no matter how profitable a speculation the purchase may be, and after such redemption an action may be maintained to enforce payment of the judgment, although the value of the lands redeemed far exceeds the amount of the judgment and money paid on the redemption: Van Horne v. McLaren, 8 Paige, 285; 35 Am. Dec. 685; Emmet v. Bradstreet, 20 Wend. 50. Whether the money tendered for redemption of the property sold, by one entitled to redeem, is his own or money furnished by another, is immaterial, and third persons have no right to inquire from what source the redemptioner gets the money he proposes to affect the redemption with: Seale v. Doane, 17 Cal. 477. If a creditor redeems by virtue of a junior judgment, he cannot recall the money paid for that purpose, although he also has a judgment older than the one under which the land was sold, and the premises are not worth more than the sum bid by the purchaser: American Exchange Bank v. Morris Canal Co., 6 Hill, 362. And if the judgment debtor before the time for redemption expires deposits with the sheriff money enough to redeem the land from the sale, and the sheriff, after the time for redemption expires, executes and delivers to the purchaser a deed, the judgment debtor, to claim the benefit of the redemption, must not withdraw his money on deposit with the sheriff, for by so doing he ratifies the act of the officer in delivering the deed: Wilkins v. Willson, 51 Cal. 212. The tender of the redemption money extinguishes the purchaser's lien, and is equivalent to payment although such tender is refused. By such tender the officer's authority to convey to the purchaser is terminated: Hershey v. Dennis, 53 Cal. 77; Jonsen v. Nabring, 50 Ala. 392; Searcey v. Oates, 68 Ala. 111; Ritchie v. Ege, 58 Minn. 291. If the redemptioner tenders to the sheriff the amount necessary to redeem, and it is refused, he may maintain an action to redeem without paying the tender into court if he keeps it good, and is able and willing to pay it into court when required: Ritchie v. Ege, 58 Minn. 291. Payment of the amount necessary to redeem by the execution defendant, for the purpose of redemption, to the officer who sold the land, without objection by the latter, nullifies and abrogates the sale as between such defendant and the purchaser, though the sheriff has not formally cancelled the certificate of purchase, nor directed the execu-

tion of a certificate of redemption: Colorado Mfg. Co. v. McDonald, 15 Colo. 516. And as the rights acquired by the purchaser at execution sale are destroyed by the payment of the purchase money by the execution defendant within the time to redeem, a deed subsequently executed to such purchaser by the sheriff conveys nothing, but constitutes a cloud on the title which may be removed by suit for that purpose: Colorado Mfg. Co. v. McDonald, 15 Colo. 516.

In some jurisdictions the purchaser at an execution sale, upon payment of the amount of his bid, is entitled to a conveyance of the property immediately. "By such conveyance he is at once invested with the legal title and continues so invested until he makes a reconveyance to the defendant. Where this rule prevails, the defendant, in case the purchaser refuses to receive the redemption money, or to reconvey the title, is obliged to resort to a bill to redeem in order to enforce his rights, and become reinvested with the legal title to his property": 2 Freeman on Executions, sec. 321; Paris v. Burger, 4 Hump. 324; Pillow v. Langtree, 5 Humph. 389; Burk v. Bank of Tennessee, 3 Head, 686; Mitchell v. Brown, 6 Cold. 505; Hawkins v. Jamison, Mark & Y. 82; Hill v. Walker, 6 Cold. 424; 98 Am. Dec. 465. In Oregon, the purchaser may immediately enter, occupy, and use the premises sold for the ordinary purposes to which property of like character might be put, but, if the property is redeemed, the effect of the sale is terminated, and the premises must be restored to their original condition. Thus, if the judgment debtor redeems, he may recover the value of a crop growing upon the land at the time of the sale, and harvested by the purchaser while in possession: Cartwright v. Savage, 5 Or. 395. If the purchaser has leased the property to a tenant, he cannot retain the rents and profits received as against the redemptioner, and in all cases the product of the property must be accounted for to the latter: Balfour v. Rogers, 64 Fed. Rep. 925. It has, however, been held that when a judgment debtor, whose lands have been sold under execution, seeks to redeem from the purchaser, he is not entitled to the outstanding crops on the land as against a tenant by the year of such purchaser: Gardiner v. Langford, 86 Ala. 508. Nor is the judgment debtor, after redeeming, entitled to recover of the purchaser for rents while the latter was in possession: Kannon v. Pillow, 7 Humph. 281; Burk v. Bank of Tennessee, 3 Head, 686.

In a great majority of the states, no valid conveyance can be made until the expiration of the time allowed to redeem. Hence a redemption accomplished by the judgment debtor or his grantee has the effect of extinguishing the rights of the purchaser and of releasing the judgment debtor's title from the consequences of the sale, leaving it subject to all other valid rights and liens: Phyfe v. Riley, 15 Wend. 248; 30 Am. Dec. 55; Boyce v. Wright, 2 Abb. N. C. 163; Bodine v. Moore, 18 N. Y. 347; Livingston v. Arnoux, 56 N. Y. 507; Warren v. Fish, 7 Minn. 432; Standish v. Vosberg, 27 Minn. 175.

HANTHORN *v.* OLIVER.

[32 OREGON, 57.]

JUDGMENTS BY DEFAULT—RELIEF FROM—ABUSE OF DISCRETION.—A judgment by default should be set aside for excusable mistake and an honest misunderstanding by defendant, if it appears that he was informed by his counsel on Monday that the case was set for Tuesday, and, believing that Tuesday of the next week was intended, he attended at that time, and then, for the first time, found that judgment had gone against him by default, at which time he immediately applied to the court to have the judgment vacated on terms, and showed that he had a good and meritorious defense, aside from the statute of limitations, which was available, although not pleaded. In such case, a refusal to set aside the judgment is an abuse of discretion which may be corrected on appeal.

J. H. Smith, and F. D. Winton, for the appellant.

F. J. Taylor, for the respondent.

[60] BEAN, J. Upon the facts disclosed by the record, we are of the opinion that the defendant was entitled to have the judgment opened up, and to make his defense, and that the denial by the trial court of his motion for that purpose is reversible error. The case presented is not one of negligence or omission on the part of either defendant or his counsel, but is an excusable mistake, growing out of an honest misunderstanding of the defendant as to the time of trial. His counsel told him on Monday that the case was set for Tuesday (meaning the following day), but he understood it to be Tuesday of the next week. This was quite a natural mistake under the circumstances, and to hold that on account thereof he should have no relief from the judgment rendered against him, but must lose the benefit of a good and meritorious defense, appears to us [61] to establish an unnecessarily harsh rule of practice. That he intended to make a defense is obvious from the fact that he was on hand, ready for trial, at the time he supposed the case was to be heard, and immediately applied to have the judgment vacated on terms. No laches or unnecessary delay can be justly imputed to him, and there is nothing in the record to indicate that he was not proceeding in the utmost good faith, or that plaintiff would have been seriously injured by vacating the judgment, and allowing the case to be tried on its merits. The action itself is brought upon a demand which appears, from the undisputed affidavit filed by the defendant, to have been long since barred by the statute of limitations, and, although he does not place his defense upon that ground, yet it furnishes a very

cogent reason why he should be allowed the benefit of a trial upon the issue as joined. If the plaintiff's claim is just, he cannot be wronged by opening up the judgment; but, if it is unjust, a very grievous injury will be done the defendant by allowing it to stand. Under such a state of facts, and where, as in the case at bar, the application is made soon after the default, and no serious delay or injury could have resulted to the plaintiff, the defendant should, in our opinion, have been given an opportunity to defend upon such terms as the trial court might have deemed proper.

It is true, as claimed by plaintiff's counsel, that an application to be relieved from a judgment under section 102 of the statute (Hill's Annotated Laws), is addressed to the sound discretion of the [62] trial court, and that its orders in the premises will not be disturbed on appeal unless there has been an abuse thereof. But, as said by Mr. Justice Wolverton, in Thompson v. Connell, 31 Or. 235, 65 Am. St. Rep. 818: "The discretion here spoken of is 'an impartial discretion, guided and controlled in its execution by fixed legal principles'; 'a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to defeat, the ends of substantial justice'; and for a manifest abuse thereof it is reviewable by an appellate jurisdiction": Citing authorities. And "applications of this character," says the supreme court of California in Watson v. San Francisco etc. R. R. Co., 41 Cal. 20, "are addressed to the legal discretion of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined by its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in case where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to decline to relieve. The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt [63] should be resolved in favor of the application. In connection with its allowance, terms and conditions ought generally to be imposed upon the party in default, which, of course, should be more or less severe, as the particular circumstances

would seem to warrant." This seems to be a very clear and satisfactory statement of the rule: 6 Ency. of Pl. & Pr., 165 et seq., and note; 1 Black on Judgments, sec. 354; 1 Freeman on Judgments, sec. 106; and a note to Burnham v. Hays, 58 Am. Dec. 389.

A reference to some of the adjudged cases will show its application. Thus, where the defendant's attorney, being about to remove from town, called at defendant's office, and left the papers in a case then pending with his bookkeeper, with instructions to tell the defendant that he would have to get another attorney on account of his departure, but the bookkeeper, being busy, and supposing the papers related to another matter, failed to give the message, and the case was set for trial, and judgment rendered therein without either the defendant or his attorney being present, it was held that the refusal of the trial court to set it aside was reversible error: Grady v. Donahoo, 108 Cal. 211. In Dodge v. Ridenour, 62 Cal. 263, judgment was rendered against the defendant in the absence of his counsel, who forgot the date set for the trial, and the order of the court overruling a motion to set the judgment aside was reversed by the appellate court. So, also, in Reidy v. Scott, 53 Cal. 69, it was held that a mistake of the defendant as to the day he was served with process was a sufficient [64] excuse for failing to answer within the time required, he having immediately applied to set aside the default; and that it was error for the court below to deny the motion. And again in Pearson v. Drobaz Fishing Co., 99 Cal. 425, the order was reversed because the court refused to set aside a judgment on a showing that it was obtained through a mistaken belief of counsel that the case would not be reached on the day it was set for hearing, because of other cases ahead of it on the calendar. So, also, where a defendant, immediately after service of process, commenced making preparations for his defense, but, owing to a multitude of pressing engagements, which shortly afterward called him away from home, and out of the state, he mistook the day when his answer was due, and defaulted, it was held that the order of the circuit court in refusing to open up the default, and allow him to answer, was erroneous: Johnson v. Eldred, 13 Wis. 486. Many other cases could be cited, but these are sufficient.

The order overruling the motion will be reversed, and the cause remanded to the court below, with directions to allow it, and set aside the judgment, upon such terms as may seem just and equitable.

JUDGMENT BY DEFAULT—VACATING FOR MISTAKE.—One against whom a judgment by default has been taken is entitled to equitable relief, where his failure to defend was not a negligent omission on his part: Note to Nichells v. Nichells, 57 Am. St. Rep. 550; Anaconda Min. Co. v. Saile, 16 Mont. 8; 50 Am. St. Rep. 472, and note; Baxter v. Chute, 50 Minn. 164; 36 Am. St. Rep. 633, and note.

LANDIGAN *v.* MAYER.

[32 OREGON, 245.]

ASSIGNMENT OF CONDITIONAL SALE CONTRACT.—If a contract for a conditional sale provides that title shall remain in the vendor to secure the purchase price, while possession of the property is delivered to the vendee, the assignment of such contract by the vendor carries with it the right of property, together with the right of possession for condition broken, whether the default be prior or subsequent to the assignment.

FIXTURES—CHATTELS PRESERVED BY AGREEMENT. If chattels are of such nature that they do not lose their distinctive identity by annexation, and do not thereby become so essentially a part of the structure as that their removal will materially injure or destroy the structure, or destroy or unnecessarily impair the value of the chattels, their original character may be preserved by agreement of the parties interested.

FIXTURES—AGREEMENT CONCERNING—RIGHTS OF PURCHASER.—A purchaser for value, and without notice of realty to which chattels have been annexed, is entitled to them as against one who claims them under a prior agreement, by which they were to preserve their original character and not lose their identity as chattels.

MORTGAGE—CONSIDERATION.—ACTUAL LIABILITY incurred by becoming a surety on a redelivery bond is sufficient consideration for a mortgage given as indemnity to such surety.

MORTGAGES—PROTECTION TO MORTGAGEE.—A bona fide mortgagee, or his assignee of the mortgage, without notice of a prior claim, is entitled to the same protection as a bona fide grantee without notice.

MORTGAGES—ASSIGNMENT—NOTICE OF PRIOR CLAIMS.—An assignee of a mortgage, with notice of prior claims against his assignor, is protected against such claims, if they were invalid for want of notice as against the assignor.

EVIDENCE TO DISPUTE ADMITTED ALLEGATIONS.—It is error to admit evidence to dispute a material allegation that stands admitted by the pleadings.

MORTGAGES—FORECLOSURE—PROTECTION TO PURCHASER.—A purchaser under mortgage foreclosure is entitled to the same protection against prior claims as the mortgagee had under the mortgage.

JUDGMENTS—CONCLUSIVENESS.—One not made party to foreclosure proceedings is not bound by the decree therein, and may attack the mortgage for want of good faith, or a valid consideration, as though such decree had not been entered.

Action by J. Landigan, against F. J. A. Mayer, administrator of the estate of G. Herrall, deceased, to recover certain personal property, consisting of a planer, boiler, engine and governor

bought of J. M. Arthur & Co., by J. Tice, who, with Viola Tice, entered into contracts for conditional sale of such property. It was subsequently transferred and sold to the South Portland Lumber Co., which executed a mortgage on the premises on which the property in dispute was situated to G. Herrall, whose administrator claims it on the ground that it was sold to Herrall under foreclosure of his mortgage. Plaintiff claims the property under an assignment of the contracts for its sale, made to him by Arthur & Company. Judgment for plaintiff, and defendant appeals.

Durham, Platt & Platt, E. Mendenhall, E. B. Watson, and B. B. Beekman, for the appellant.

Hume & Hall, for the respondent.

249 WOLVERTON, J. It is urged that the assignments by J. M. Arthur & Co. to the plaintiff transferred their claims or demands only, and that the title to the property, notwithstanding, remained in J. M. Arthur & Co. In this we cannot concur. The contracts are not only evidences of J. M. Arthur & Co.'s demands against Tice, but they contain the conditions upon which he may retain the property, and obtain a perfect title thereto, it having been delivered into his possession with the execution of such contracts. The transactions amount to conditional sales, with delivery of possession, the sole purpose of retaining the bare legal title being to secure payment of the purchase price. Tice could not be deprived of his possession or right to acquire the title except for some default in his agreements, and, in view of these conditions, we think that the assignments of the contracts carried with them the right of property, together with the right of possession for condition broken. Plaintiff could, therefore, maintain the action, and it could make no difference whether the defaults occurred before or subsequent to the assignments: Ross Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608; Schlieman v. Bowlin, 36 Minn. 198; 250 Lahmers v. Schmidt, 35 Minn. 434; Burnell v. Marvin, 44 Vt. 277.

Ordinarily, the personalty sought to be recovered would be classed as fixtures and considered part and parcel of the realty to which they are annexed. But where chattels are of such a nature as that they do not lose their distinctive identity by annexation, and do not thereby become so essentially a part of the structure as that their removal will materially injure or destroy the structure, or destroy or unnecessarily impair the value of the

chattels, their original character may be preserved by agreement of the parties interested: Henkle v. Dillon, 15 Or. 610; Binkley v. Forkner, 117 Ind. 176; Tifft v. Horton, 53 N. Y. 377; 13 Am. Rep. 537; Sisson v. Hibbard, 75 N. Y. 542.

A purchaser, however, of the realty to which such property has become so annexed, for value, and without notice or knowledge of the distinctive character cast upon it by the agreement, will take it as a part and parcel of the realty, and his title will prevail as against those claiming under the agreement: Muir v. Jones, 23 Or. 332; Forrest v. Nelson, 108 Pa. St. 481.

Now, if Herrall, as defendant claims, became surety, at the instance of the South Portland Lumber Company, upon a redelivery bond for such company, and thereby contracted an actual liability, this would constitute a sufficient consideration for the mortgage given him for his indemnity. That question was properly submitted to the jury.

[251] Defendant in his answer alleged that the South Portland Company, "on ———, 1891, being the owner in fee and in possession of said property, executed and delivered to this defendant, who had no notice or knowledge of plaintiff's claim or of any of the facts alleged in the complaint, its mortgage on all said real property." Then, after showing the foreclosure of Failing's prior mortgage, and of Herrall's mortgage in the same suit, he having been made defendant, it is further alleged: "That on March 30, 1893, upon execution sale under said decree, this defendant became the purchaser of all of said real property for fourteen thousand five hundred dollars, which he then paid, and on May 18, 1893, the said circuit court confirmed said sale in all respects; that defendant had no notice of plaintiff's claim, and was an innocent purchaser, for value, of all of said real property." This latter clause, alleging want of notice and knowledge, is denied specifically by the reply, but the former one is not, and therefore stands admitted. Plaintiff was permitted to prove, over the objection of defendant, that at and prior to the time of the execution of the mortgage Herrall had notice and knowledge of the claim referred to, and this is assigned as error. To meet this claim of error the plaintiff urges that the allegations are both touching the same fact, and therefore that a denial of one is sufficient. If such was the case, it would not have been necessary to repeat the denials. The former allegation, however, is of the absence of notice or knowledge at the time of the execution of the [252] mortgage, and the latter has reference to the time of purchase at the execution sale. The distinction

is marked, and quite material. The doctrine is specifically stated in the headnote to Pierce v. Faunce, 47 Me. 507, that "a mortgage is pro tanto a purchase, and the bona fide mortgagee or assignee of the mortgage, without notice of a prior claim, is entitled to the same protection as a bona fide grantee without notice": See, also, Porter v. Greene, 4 Iowa, 571; Manufacturing Co. v. Chalmers, 2 Utah, 542; and 2 Jones on Mortgages, sec. 710. And in Plaisted v. Holmes, 58 N. H. 619, the same doctrine is announced as it respects personal chattels. It is also established that a purchaser without notice from a prior bona fide purchaser without notice who is entitled to protection as such is himself entitled to the same protection as it concerns claims which were invalid as against his grantor: Varick v. Briggs, 6 Paige, 323; Wood v. Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Webster v. Van Steenbergh, 46 Barb. 211; Pierce v. Faunce, 47 Me. 507. It thus appears that if Herrall took and received the mortgage bona fide and for value he would be protected, although he may have had knowledge of plaintiff's claim at the time he purchased at the sale under the decree. So it cannot be that the allegation of the absence of notice at the time of the execution of the mortgage is of the same fact as the allegation of want of notice at the time of purchase at the execution sale. It may also be predicated of the former allegation that it is of a fact material to the defense, and ought to have 253 been denied if it was designed to controvert it. Not having been denied, it becomes a fact admitted, and is conclusive upon the plaintiff, and it was error in the court to permit the introduction of testimony tending to dispute it. The purchase of Herrall was under the decree of foreclosure, which included the foreclosure of his mortgage, as well as that of Failing, the plaintiff in the suit. The execution must be deemed to have issued at the joint request of himself and the plaintiff therein (Hill's Annotated Laws, sec. 417, subd. 1), and a purchaser at the sale would be entitled to like protection as Herrall would be under his mortgage.

The defendant introduced in evidence in his own behalf the mortgage from the South Portland Lumber Company to Herrall and the judgment-roll in the foreclosure suit. The mortgage purported to be given to secure the payment of a promissory note calling for seven thousand five hundred dollars executed by said company to Herrall. The judgment-roll also showed that the decree was in favor of Herrall for a like amount. Evidence was offered in rebuttal by plaintiff, and received over objections,

tending to show that the said consideration for the mortgage was different from what it purported to be upon its face. It is claimed that the decree is conclusive against plaintiff, both as to the good faith and sufficiency of consideration for the mortgage. But this cannot be so. The plaintiff was not made a party to the foreclosure suit, and, not having had his day in court, could not be bound by the decree, as it may [254] affect the property sought to be recovered. The mortgage stands as to him as though it had never been foreclosed, and he is at full liberty to attack it, for want of good faith or a valid consideration to support it, as though the decree had never been entered. But for the error noted the judgment will be reversed and the case remanded for such further proceedings as may seem advisable, not inconsistent with this opinion.

FIXTURES—AGREEMENT FIXING CHARACTER OF CHATTELS.—To determine whether a thing is a fixture or not we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used: Note to Capehart v. Foster, 52 Am. St. Rep. 585. Many thing ordinarily considered fixtures may become, to all intents and purposes, personal property as between the parties interested in the realty and fixtures, by agreement between them to that effect: Cross v. Weare Commission Co., 153 Ill. 499; 46 Am. St. Rep. 902, and note. But in cases where parties may agree among themselves to treat fixtures as personalty, such agreement cannot change the character of the property as to third persons: Cross v. Weare Commission Co., 153 Ill. 499; 46 Am. St. Rep. 902.

MORTGAGES—SUFFICIENCY OF CONSIDERATION.—Liability for another on a contract in force is a sufficient consideration for a mortgage: Moore v. Fuller, 6 Or. 272; 25 Am. Rep. 524. Where a mortgage is given for a specified sum, it is competent to prove by parol evidence that it was given to indemnify the mortgagee for becoming security for the mortgagor on a note: Kimball v. Myers, 21 Mich. 276; 4 Am. Rep. 487.

MORTGAGES—ASSIGNMENT OF—RIGHTS OF ASSIGNEE.—The assignee of a mortgage and accompanying negotiable note, transferred before maturity and for a valuable consideration, takes the securities free of any equities existing between the original parties of which he had no notice: Williams v. Keyes, 90 Mich. 290; 30 Am. St. Rep. 438, and note. See Wilson v. Ott, 173 Pa. St. 253; 51 Am. St. Rep. 767. But he takes no other rights than those of the mortgagee: Note to Sanford v. Kane, 23 Am. St. Rep. 610.

MORTGAGES—FORECLOSURE—DECREE AS RES JUDICATA.—A decree in a suit foreclosing a mortgage, whether right or wrong, is binding on the parties to the suit and those purchasing from them, or either of them during its pendency, and it cannot be attacked collaterally if the court had jurisdiction of the parties and of the subject matter: Norris v. Ile, 152 Ill. 190; 43 Am. St. Rep. 233. See Batterman v. Albright, 122 N. Y. 484; 19 Am. St. Rep. 510.

LADD *v.* PORTLAND.

[32 OREGON, 271.]

CONSTITUTIONAL LAW.—CONTRACTS BY A STATE GRANTING IMMUNITY from taxation to individuals, or corporations, are within the provision of the federal constitution inhibiting the passage of laws by the state impairing the obligation of contracts.

CONSTITUTIONAL LAW.—CONTRACTS, within the meaning of the provision of the federal constitution prohibiting state legislation impairing the obligations of contracts, are voluntary agreements of minds upon a sufficient consideration to do or not to do certain things.

MUNICIPAL CORPORATIONS—STREET ASSESSMENTS. The power to assess the cost of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily reposed in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations. It is, however, never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms.

ASSESSMENTS FOR LOCAL IMPROVEMENTS ARE SUSTAINED on the theory of special benefits corresponding in value to the cost of the improvements.

CONSTITUTIONAL LAW — CONTRACTS — STREET ASSESSMENTS.—A provision in a city charter that a street may be improved at the expense of the abutting owner, and that when thus improved it shall not again be improved in the same manner, does not, though the owner has paid for such improvement, constitute a contract with the state. Hence the legislature may thereafter constitutionally remove the limitation, and authorize the city to reimprove or rebuild the street and assess the cost thereof to the abutting property.

T. V. Holman, for the appellants.

R. R. Giltner, and W. M. Cake, city attorney, for the respondent.

[271] BEAN, J. This is a suit to restrain the collection of an assessment for street improvements. The facts, in brief, are that by article 6 of the charter of East [272] Portland, adopted in 1870, the board of trustees was authorized and empowered to improve the streets and parts of streets within the limits of the city at the expense of the abutting property; but it was provided (section 27) that when a street "has been once improved, under and by virtue of the provisions of this chapter, thereafter such street or part thereof is not subject to be again improved, but may be repaired": Laws 1870, p. 156. Under the power thus delegated, the board of trustees of East Portland, in 1883, made a full improvement of Fifth street in front of plaintiffs' property by building to the established grade an elevated roadway thirty-

six feet wide, with an elevated sidewalk twelve feet wide on each side thereof, and assessed the cost upon the abutting property, which assessment was duly paid by plaintiffs' predecessor in interest. Afterward, and in 1891, the cities of Portland, East Portland, and Albina were, by an act of the legislature, consolidated into one municipality, under the name of the city of Portland, and the several acts of incorporation of the respective cities repealed: Laws 1891, p. 796. In 1893 (Laws 1893, p. 810) the present charter of the city of Portland was passed, and the act of 1891 repealed, all vested rights being reserved. By chapter 9 the council is given power and authority, whenever it deems it expedient, to improve any street or part thereof, and assess the cost on the abutting property. Under the authority thus granted, the common council, in 1894, proceeded to and did improve said Fifth street along and in front of the plaintiffs' [273] property, formerly improved under the East Portland charter of 1870, assessed the cost thereof against the abutting property, and was threatening to enforce its collection when this suit was brought.

Plaintiffs contend that the provisions of the act of 1893, authorizing such improvement at the expense of the owners of abutting property, are unconstitutional and void, under the clause of the federal constitution which forbids the states to pass any law impairing the obligations of a contract. The argument is, that the provision of the charter of the former city of East Portland, under which the first improvement was made, that when a street had been once improved it should not be subject to be again improved, constituted, when the street had in fact been improved, a contract between the public and the property owner by which the state for all time so tied up its hands as to preclude it from granting to the municipality the power to reimprove the street, except out of the general fund, and at the expense of the entire property of the city. It is familiar law that any legislation by a state which impairs in any respect the obligations of a valid contract between individuals, or between the state or one of its governmental agencies and any person or corporation, is violative of the provisions of the federal constitution referred to, and void. This doctrine has been so often announced by the supreme court of the United States, beginning with Fletcher v. Peck, 6 Cranch, 87, and the Dartmouth College Case, 4 Wheat. 518, that the principles upon which it rests, as [274] said by Mr. Justice Swayne in Von Hoffman v. Quincy, 4 Wall. 535, "are now axiomatic in American jurisprudence, and are no longer open to controversy." And it may be regarded as equally well

settled, though not without protest on the part of the state courts and the earnest dissent of several of the federal judges, that a contract by the state granting immunity from taxation to an individual or corporation is within the constitutional provision inhibiting the passage of laws by the state impairing the obligations of contracts: Cooley on Constitutional Limitations, *274. See, also, Mr. Russell's admirable article in 30 Am. Law Rev. 321, on the "Status and Tendencies of the Dartmouth College Case." The controversy in the case before us lies, therefore, in very narrow limits. The only question is, whether the provisions of the charter of East Portland, under which the street was improved in 1883, was a contract between the public and the owner that such property should thereafter, for all time, be exempt from special taxation for the improvement of the street in front thereof. If so, the plaintiffs are entitled to the relief demanded. If not, the suit should be dismissed.

The supreme court of the United States, in interpreting the clause of the constitution now under consideration, has always taken the terms thereof in their ordinary meaning, and holds that the word "contract," as used therein, means a voluntary agreement of minds, upon a sufficient consideration, to do or not to do certain things: Murray v. [275] Charleston, 96 U. S. 432; Louisiana v. Mayor etc., 109 U. S. 285; Fisk v. Jefferson Police Jury, 116 U. S. 131. And in our opinion the legislation in question has none of the essential ingredients of such a contract. The power to assess the costs of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations; but it is "never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms": Philadelphia R. R. Co. v. Maryland, 10 How. 394. And even then, if the exemption is not supported by some consideration, it may be revoked at any time: Rector etc. v. County of Philadelphia, 24 How. 300. The charter of East Portland, under which the first improvement was made, was a partial delegation of such power to the city, and, when once exercised, was exhausted—not, however, by reason of any contract between the public and the lotowner, nor because the power of taxation in the state was not adequate to require an assessment for the reimprovement of the street, but because the power delegated to the city had by its express terms ceased to exist. And how can this provision of the charter be tortured into

a contract? It does not purport to be one, for it makes no offer of exemption to the landowner, either expressly or impliedly, in consideration of the performance of some [276] voluntary act on his part; nor does it ask or agree to accept anything from him which the state could not have unconditionally exacted. The assessment of the cost of improving the street in front of his property was an exercise of sovereignty, and a proceeding in invitum. He was simply required to discharge a duty which he owed to the public, and the performance of which cannot, by any show of reason, be construed into a consideration moving from him to the state upon which a contract can be supported. The validity of assessments for local improvements is sustained on the theory of special benefits corresponding in value to the cost of the improvement, and so the property owner receives, in theory at least, full value for the money exacted from him; and, therefore, plaintiffs' predecessor, in paying the assessments made against his property for the first improvement of the street, sacrificed no legal right, nor did he make any extraordinary or unusual contribution to the public. He simply paid for the special benefits conferred. The manifest purpose of the provision of the charter under consideration was to define the mode and extent of the power of the council in the matter of street improvements, and the limitation on the exercise of such power was a mere concession to the citizen, and an act of grace, and not a contract by which the state forever relinquishes the sovereign power of taxation. It was a limitation voluntarily imposed by the legislature upon the powers of the city, which that department of the state government could remove at any time public policy or the interests [277] of the municipality might seem to demand, and bound the state only so long as the statute remained unrepealed.

No authority, federal or state, has been cited which goes to the extent of holding such legislation to be a contract, within the meaning of the federal constitution; while the courts of Kentucky and New Jersey have held that a provision in a city charter similar to the one now under consideration does not constitute such a contract, but that the legislature may constitutionally thereafter remove the limitation, and authorize the city to reimprove or rebuild the street, and assess the cost thereof to the abutting property: Bradley v. McAtee, 7 Bush, 667; 3 Am. Rep. 309; State v. Mayor etc., 35 N. J. L. 168; 37 N. J. L. 415; 18 Am. Rep. 729. These are the only cases in point of which we have any knowledge, and the reasoning of Mr. Chief Justice Beasley in the New Jersey case (State v. Mayor etc., 37 N. J. L.

424; 18 Am. Rep. 729) is so clear an exposition of the law, and it seems to us so unanswerable in its logic, that we quote from it at length. He says: "This statute declares that it shall be lawful for the common council, on the application of three-fourths of the owners of property in any street, to order, et cetera, and it then adds, 'that after such grading, et cetera, is effected, then the city shall take charge of and keep the same in repair, without further assessment': Pub. Laws 1849, p. 206. The argument was, that after the landowners had petitioned, and the work was done, a bargain was constituted, [278] the essential stipulation of which is that the expense of keeping the street in order shall be borne by the public. But how is this language to be converted into that of contract? It is not so in form, for it makes no offer to the landowner. Nor is the substance with which it deals the subject matter of agreement. It does not purport to ask from the citizen anything which the state has not the right to demand. The purpose is to define the mode and the extent of the legislative power of the municipality. The power conceded might have been given in an unqualified form, but its exercise was restricted with the condition that it should not be used unless a certain proportion of the owners of property consented, and that the power should not be used a second time. But these limitations on the prerogative of local legislation are concessions to the citizen, and cannot, with any show of reason, be transformed into considerations moving from the citizen to the state, on which a contract can be built up. The admission of such a doctrine would carry many mischiefs with it. Agreements could be inferred from the large number of the ordinary acts of legislation. Public roads are laid on the application of a certain number of freeholders, and the statute directs 'that after such roads are laid they shall be opened and maintained at the public expense.' Why, under such circumstances, cannot a contract be claimed as well as in the case now in hand? Numerous other examples of laws, from which, by the same course of reasoning, contracts might be deduced, will readily occur, [279] if the mind is given to the subject. Neither do the decisions which were cited lend, as it appears to me, the least countenance to the doctrine in question. They are all cases outside of the ordinary field of legislation, and in which the citizen was induced to do some act, or yield up some right or property which could not be taken from him except by his voluntary cession. The true principle undoubtedly is, that when it is alleged that any part of the sovereign power has been parted with, by force of an agree-

ment, such agreement must be clearly manifested. The cases are largely collected in the excellent work of Chief Justice Cooley on Constitutional Limitations at page 280. The language of the present statute has not such an aspect, and the intendment that it was the intention to give up forever any part of the public control, with respect of the mode of keeping in order the streets of a great city, is not to be entertained for an instant."

This disposes of the first point, and there is no force in the contention of plaintiffs, that because the act of consolidation and the present city charter provide that no rights previously vested nor liabilities previously incurred should be lost, destroyed, or impaired, the legislature was prohibited from thereafter authorizing the city of Portland to reimprove the street in question at the expense of the abutting property; for, unless the provisions of the charter of 1870 are to be interpreted as a contract between the owners of the property abutting a street once improved and the public, the plaintiffs clearly had no vested right to an exemption [279] from assessments for street improvements. It follows that the decree of the court below must be affirmed, and it is so ordered.

STATUTES—VALIDITY—OBLIGATION OF CONTRACTS.—If the effect of a contract is deteriorated or substantially lessened by the passage of an act, the obligation of the contract is impaired: Swinburne v. Mills, 17 Wash. 611; 61 Am. St. Rep. 932, and note. The legislature, though it may modify and repeal acts of former legislatures, cannot abridge succeeding legislative action, and has no power by subsequent legislative enactment, to divest the right of property derived from a contract made under the authority of a former legislature: State v. Barker, 4 Kan. 324; 96 Am. Dec. 175.

TAXES—STREET ASSESSMENTS—POWER OF MUNICIPAL CORPORATIONS.—Local assessments for street improvements are an exercise of the taxing power: Violett v. Alexandria, 92 Va. 561; 53 Am. St. Rep. 825. The power to tax and levy assessments may be delegated to municipal corporations: Note to Murphy v. Mayor, 22 Am. St. Rep. 357; but such power can only be exercised according to charters and within the limits of the constitution of the state: Mauldin v. City Council, 42 S. C. 293; 46 Am. St. Rep. 723, and note; Whiting v. West Point, 88 Va. 905; 29 Am. St. Rep. 750. See monographic note to People v. Mayor etc., 55 Am. Dec. 285-290, discussing assessments for street improvements.

EASTMAN *v.* MONASTES.

[32 OREGON, 291.]

MALICIOUS PROSECUTION—EVIDENCE OF WANT OF PROBABLE CAUSE.—The acquittal of a defendant on the trial of a criminal charge is not prima facie evidence of want of probable cause for the prosecution.

C. M. Idleman, for the appellant.

W. L. Nutting, for the respondent.

293 BEAN, J. From the view we have taken of the ruling on the motion for a nonsuit, it is unnecessary to consider the other questions in the case, and we shall therefore assume, for the purposes of this opinion, that all the evidence admitted was competent. The motion for a nonsuit is based upon the theory that the plaintiff failed to prove that the prosecution was malicious or without probable cause. Upon this point, the bill of exceptions, which contains the affirmative statement that "there was no evidence whatever offered by the plaintiff, of any nature or description other than" as therein stated, "concerning malice or want of probable cause," recites that plaintiff, being called as a witness in his own behalf, "testified concerning the arrest as set out in the complaint, and also went into the detail of the matters transacted in the justice's court upon which he claimed to have been arrested upon a warrant issued upon a complaint sworn to by the defendant, and also of his discharge"; also, "concerning the construction of a certain printing-house which he claimed had been erected by himself upon the second story, and over and on top of a water-closet of defendant's building, and that he was occupying certain rooms in defendant's building as a photograph gallery, and using the said printing-house to print photographs in." Evidence bearing upon the question of damages is then set out, after which it is stated that the plaintiff gave in evidence a copy of the docket entries of the justice's court concerning the arrest, trial, and acquittal of the plaintiff, a copy of which is set out in the bill of 294 exceptions, and also a part of the deposition of one Prescott, to the effect that the printing-house referred to was built by the plaintiff at his own cost and expense, over and on top of a small brick building adjacent to the main building, and that the defendant notified him in 1889 that it must either be painted or removed, and that defendant was about the photograph gallery frequently, and witness never heard him make any claim to the printing-house. This is all the evidence contained in the bill of exceptions bearing upon the question of malice or probable cause. It thus manifestly appears that there was no evidence of the want of probable cause given on the trial, unless the judgment of acquittal is prima facie evidence thereof, and sufficient to put the defendant on his proof. The charge made against the plaintiff in the justice's court was that of willfully defacing a

building not his own, and as to whether defendant had reasonable grounds for making such a charge the bill of exceptions is entirely silent. It only goes to the effect that plaintiff, at the time of his arrest, was engaged in removing a photographic printing-house, built by him on top of a small brick building belonging to the defendant, and which, under the terms of his lease, he had a right to remove; but there was no evidence offered or given that he was doing so in a careful and prudent manner, or that he was not wantonly and willfully defacing and injuring the defendant's building. The want of probable cause is the very gist of the action for malicious prosecution, and it is elementary [295] law that it must be affirmatively proved by the plaintiff. The truth of other material allegations may be inferred from such proof, but the want of probable cause cannot be inferred from anything else. It must be substantially and expressly proved, and cannot be implied. The onus is always on the plaintiff to prove affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution: Newell on Malicious Prosecution, 282. And there is no such proof in this case, unless the judgment of acquittal is sufficient for that purpose. We are therefore brought to a consideration of the effect to be given to such a judgment.

There is much diversity of opinion in the books as to whether the discharge of an accused by a committing magistrate, or the refusal of a grand jury to indict, is prima facie evidence of the want of probable cause for the prosecution, many cases holding that it is: 2 Greenleaf on Evidence, sec. 455; 3 Lawson's Rights, Remedies, and Practice, 1094; Secor v. Babcock, 2 Johns. 203; Bostick v. Rutherford, 11 N. C. 83; Straus v. Young, 36 Md. 246; Smith v. Ege, 52 Pa. St. 419; Vinal v. Core, 18 W. Va. 1; Bornholdt v. Souillard, 36 La. Ann. 103; Frost v. Holland, 75 Me. 108; while the doctrine is stoutly denied by other authorities of equal weight and respectability: Israel v. Brooks, 23 Ill. 575; Thompson v. Beacon Rubber Co., 56 Conn. 493; Heldt v. Webster, 60 Tex. 207; Apgar v. Woolston, 43 N. J. L. 57. But it is unnecessary for us to pursue this inquiry further, for it is obvious that [296] there is a marked distinction between the acquittal of a defendant after trial upon the merits and his discharge by the examining magistrate or the refusal of a grand jury to indict. In case of a trial, the defendant is entitled to an acquittal and discharge if, upon the whole evidence, both of the prosecution and defense, there remains a reasonable doubt of his guilt, although it may appear that there was not only probable

cause for the prosecution, but a strong probability of his guilt. But it is the duty of a magistrate to hold the accused to answer, and of a grand jury to indict, if there is sufficient cause to believe him probably guilty of the crime charged. They have the very question of probable cause to try, and, if the accused is discharged, it is because, in the opinion of the magistrate or grand jury, as the case may be, there is no reasonable ground for believing him guilty. For this reason, many courts have held that the refusal of an examining magistrate to hold the accused for trial is prima facie evidence that the charge was preferred without probable cause. But it is manifest that no such effect ought to be given to the acquittal of a defendant after a full investigation of the case and an examination of all testimony on both sides. It would tend very much to discourage honest efforts to enforce the criminal laws if every person who instituted a prosecution in which the defendant was subsequently acquitted should for that reason be presumed to have acted without probable cause, and liable in damages for malicious prosecution. The result of a trial often [297] depends upon many contingencies which could not have been anticipated, and a prosecution may turn out to be entirely groundless, although the facts and circumstances known to or ascertainable by the prosecutor at the time it was instituted seemed to point unerringly to the defendant's guilt. Accordingly, the great weight of authority and reason is that the acquittal of a defendant upon the trial of a criminal charge is not prima facie evidence of the want of probable cause for the prosecution. Indeed, the doctrine is said by Depue, J., in Apgar v. Woolston, 43 N. J. L. 60, to be "universally conceded, though it results from the entire failure of the case on the part of the prosecution": Purcell v. Macnamara, 9 East, 361; Grant v. Deuel, 3 Rob. (La.) 17; 38 Am. Dec. 228; 14 Am. & Eng. Ency. of Law, 1st ed., 65; Scott v. Simpson, 1 Sand. 601; Bitting v. Ten Eyck, 82 Ind. 421; 42 Am. Rep. 505; Stone v. Crocker, 24 Pick. 81; Stewart v. Sonneborn, 98 U. S. 187; Brant v. Higgins, 10 Mo. 728; Ganea v. Southern etc. R. R. Co., 51 Cal. 141. The court below was therefore in error in denying the nonsuit, for which reason the judgment must be reversed.

MALICIOUS PROSECUTION — WANT OF PROBABLE CAUSE—EVIDENCE.—The voluntary dismissal of a suit is prima facie evidence of want of probable cause for its institution: Kolka v. Jones, 6 N. Dak. 461; 66 Am. St. Rep. 615, and note. Judgment of a justice of the peace discharging the accused is prima facie evi-

dence of want of probable cause for his prosecution: Bigelow v. Sickles, 80 Wis. 98; 27 Am. St. Rep. 25. For a discussion of the element of probable cause in malicious prosecution, see monographic note to Ross v. Hixon, 26 Am. St. Rep. 138-149.

MATTHIESEN *v.* ARATA.

[32 OREGON, 342.]

MECHANICS' LIENS—PLEADING CONTENTS OF LIEN NOTICE.—Although a complaint for the foreclosure of a mechanic's lien must show affirmatively that the lien notice contained all of the statutory requirements, the statute is sufficiently complied with if a copy of such notice is set out bodily in the complaint, or is made a part thereof as an exhibit.

MECHANICS' LIENS—REPAIRS OR FIXTURES.—If a mechanic, at the request of the lessee of a building, puts therein doors and casings, wainscoting attached with screws to strips nailed to the wall, and veneering also nailed to the wall, he is entitled to a mechanic's lien on the lessee's interest for his labor and materials. Such materials, when placed in position, constitute alterations or repairs, and not domestic or trade fixtures.

Starr, Thomas & Chamberlain, for the appellant.

A. Bernstein, R. C. Wright, and G. W. P. Joseph, for the respondents.

344 BEAN, J. On April 12, 1894, the defendant Arata, being the lessee for a term of years of a room on the ground floor of a completed five-story brick building in the city of Portland, and, desiring to fit it up for saloon purposes, entered into a contract with plaintiff Matthiesen to furnish the material and do the work necessary to wainscot it in oak, and cover the window and door casings, pilasters, and ceiling beams with a covering of the same material, so as to give them the appearance of oak, to partition off a cardroom, put in an oak door with casings and frame complete to the water-closet, cut the partition and put in an oak door to the entrance way, and other work of similar character. The wainscoting was attached with screws to strips nailed on the wall, and the other work was nailed to the fabric of the building. Arata having failed to make his payments as agreed upon, Matthiesen filed a notice of lien for the amount due him, and the other parties who either furnished material to or were employed by Matthiesen did the same. This suit was brought by Matthiesen to foreclose his lien, in which the other lien claimants, who are made defendants, seek to do likewise. The court below found 345 in favor of the defendant lien claimants, and decreed the sale of Arata's leasehold interest in the building to

satisfy their respective claims, and from this decree Arata appeals.

1. It is contended by the appellant that the cross-bills of the defendants are insufficient, because it is not averred therein that the notices of lien as filed contain "a true statement of the demand after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, or also the name of the person by whom he was employed, or to which he furnished the material, or also a description of the property to be charged with said lien, sufficient for identification, or that the claim was verified by the oath of himself or of some other person having knowledge of the facts." But this objection is without merit. A copy of the notice is set out bodily in two of the pleadings, and is annexed to and made a part of the other one as an exhibit, and this is a sufficient compliance with the rule that it must affirmatively appear from a complaint to foreclose a mechanic's lien that the notice as filed was in proper form, and contained all the essential provisions required by the statute: Pilz v. Killingsworth, 20 Or. 432.

2. The next, and principal, contention is that the work and labor performed and material furnished by the lien claimants was not for the construction, alteration, or repair of a building, but in and about the erection of trade or domestic fixtures. But we are unable to subscribe to this view. The adjudications upon the subject of fixtures and annexations are very numerous, but, as they depend upon the facts of each particular [346] case and the relations of the parties litigant, no precise rule has or can be extracted from them by which the question can be determined. It would be useless for us at this time to enter upon any general discussion of the question, or attempt to seek out analogies in the adjudged cases in support of our conclusions. The question is always one of mixed law and fact, and each case must be decided upon its particular facts; and, this being so, it is proper to observe, as a matter of caution, that the question here presented is between the lessee of a building and mechanics and materialmen who claim a lien on his interest therein, and is not between landlord and tenant, mortgagor and mortgagee, nor is it embarrassed by any agreement of the parties that the material and labor furnished should be and remain personal property, notwithstanding the manner of its annexation to the building. The simple question is, whether a mechanic, who, at the request of the lessee of a building, puts into it work and material of the character indicated, has a lien on the lessee's interest

therein for his labor and material. In our opinion, the case is clear. As said by this court in Helm v. Gilroy, 20 Or. 522: "The weight of modern authority, keeping in mind the exceptions as to constructive annexation, admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests: 1. Real or constructive annexation of the article in question to the realty: 2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; 3. The intention [347] of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made." Now, applying these rules to the case in hand, it is manifest that the material and labor of the lien claimants became, as between them and the lessee of the building, a part and parcel thereof. The erections were permanently and substantially annexed, as is usual in such cases, and could not have been removed without substantial damage to the building and essential injury to themselves. They were appropriate, or at least adapted, to the contemplated use of that part of the realty with which they were connected, and their character and mode of annexation indicate that the intention was to make them a permanent accession to the building, at least so far as Arata's leasehold interest was concerned. If they did not become a part and parcel of the building to this extent, neither do the doors and windows and similar finish in any structure. We are of the opinion that the decree of the court below should be affirmed, and it is so ordered.

MECHANIC'S LIEN—WHEN ATTACHES TO LEASEHOLD.—A mechanic's lien attaches to a leasehold estate in favor of one who has, under a contract with the lessee, furnished materials for the improvement of land leased for a term of years: Meek v. Parker, 63 Ark. 367; 58 Am. St. Rep. 119, and note. A materialman's lien for making, altering, or repairing a building, under a contract made with the lessee of the premises, extends to the leasehold interest only: Williams v. Vanderbilt, 145 Ill. 238; 36 Am. St. Rep. 486. See extended note to Lyon v. McGuffey, 45 Am. Dec. 678.

PORTLAND *v.* MEYER.

[32 OREGON, 368.]

MUNICIPAL CORPORATIONS—EXCLUSION OF SLAUGHTERHOUSES.—If a city has authority under its charter to provide for the exclusion of slaughterhouses from its limits, it has power to pass an ordinance prohibiting the use of slaughterhouses established and in operation within the city at and prior to the time of the passage of such ordinance.

CONSTITUTIONAL LAW—EXCLUSION OF SLAUGHTERHOUSE FROM CITY.—An ordinance excluding from a city a slaughterhouse already in existence and operation within its limits is a legitimate exercise of the police power, and does not violate any constitutional right of the owner.

Paxton & Beach, for the appellant.

W. M. Cake, city attorney, for the respondent.

369 BEAN, J. By subdivision 23 of section 35 of the charter of the city of Portland (Laws 1893, 822), the council has power and authority "to license, tax, control and regulate slaughterhouses and to provide for their exclusion from the city limits or any part thereof." In January, 1894, while this provision of the charter was in force, the defendant erected or caused to be erected a slaughterhouse within the corporate limits of the city, and in September following the council passed an ordinance making it unlawful for any person to maintain such a structure therein. For a violation of this ordinance by the maintenance of his previously established slaughterhouse the defendant was arrested in October, 1894, and, having been convicted, brings the cause here for review.

The only question for determination is, whether the provisions of the charter quoted confer upon the city power to prohibit the use of slaughterhouses established and in operation at and prior to the passage of an ordinance for that purpose. It is not claimed that the power to license, tax, regulate, and control slaughterhouses will support such legislation, but the contention of the city is, that the power is to be found in the authority "to provide for their exclusion from the city limits," while the defendant's position is, that the power of exclusion so conferred was intended to enable the council to prevent the future erection of slaughterhouses, and not to put an end to an existing business of that kind. This is the point of contention between the parties to this litigation.

370 1. In construing a statute, words of common use are ordinarily to be taken in their natural, plain, and obvious signi-

fication, and, in view of this rule, we are of the opinion that the power of exclusion as given by the charter is broad enough to authorize the city to prevent the maintenance of slaughterhouses already in existence, and to punish offenders against the ordinance therefor. The word "exclusion" is defined by Webster as "the act of excluding or shutting out, whether by thrusting out or by preventing admission; a debarring; rejection; prohibition"; and by the Century as "the act of excluding or shutting out"; and, also, "the act of thrusting out or expelling; ejection; extrusion." It will thus be seen that the commonly accepted meaning of the word is not only the act of shutting out, but also the act of thrusting out, and there is nothing in the city charter to indicate that it was intended to be used in any other sense. "The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and the meat afterward," was said by Mr. Justice Miller in the Slaughter House Cases, 16 Wall. 62, to be among the most necessary and frequent uses of the police power of the state. And it was the evident purpose of the legislature to give the city of Portland full power and control over the matter. It was, therefore, authorized to regulate and control slaughterhouses, if deemed advisable to permit them to exist within the corporate limits, or prohibit their maintenance altogether, whenever, in the opinion of the council, the public welfare [371] requires their exclusion. The whole question was relegated to the city, and the power conferred is sufficient to enable it to prohibit the maintenance of slaughterhouses already in existence as well as to prevent their future erection.

2. And neither the charter nor the ordinance in question is violative of any constitutional right of the defendant: Ex parte Heilbron, 65 Cal. 609; Mugler v. Kansas, 123 U. S. 623; Fertilizing Co. v. Hyde Park, 97 U. S. 659. The fact that the enforcement of the ordinance will prevent him from using the building and machinery erected for slaughterhouse purposes is no defense to this proceeding. It is true that at the time it was erected the law did not forbid the slaughtering of animals or the maintenance of a slaughterhouse within the city, but the law-making power did not thereby come under any obligation to give any assurance that the legislation upon the subject would remain unchanged. Indeed, the supervision of the public health and public morals is a governmental power which cannot be bartered away either directly or indirectly: Beer Co. v. Massachu-

setts, 97 U. S. 25; Stone v. Mississippi, 101 U. S. 814. We are therefore, of the opinion that the ordinance is valid, and the judgment of the court below must be affirmed.

MUNICIPAL CORPORATIONS—POWERS—SUPPRESSION OF SLAUGHTERHOUSES.—A statute authorizing a city to provide for the erection, management, and regulation of slaughterhouses, empowers it to forbid the operation of such houses within designated limits, except under certain specified conditions: St. Louis v. Howard, 119 Mo. 41; 41 Am. St. Rep. 630, and note. See Huesing v. Rock Island, 128 Ill. 465; 15 Am. St. Rep. 129; Chicago v. Rumpff, 45 Ill.. 90; 92 Am. Dec. 196; Cronin v. People, 82 N. Y. 318; 37 Am. Rep. 564.

WHEELER *v.* TAYLOR.

[32 OREGON, 421.]

COTENANCY—EVIDENCE OF OUSTER.—The evidence necessary to prove ouster by one cotenant against another is much greater than in cases in which such relation does not exist between the parties.

COTENANCY—ADVERSE POSSESSION—NOTICE.—Entry upon real property by a person claiming to be a tenant in common can never become the foundation for an adverse possession, as against his cotenants, until they have notice of his repudiation of their rights.

COTENANCY—POSSESSION—PRESUMPTION.—The possession of one cotenant of the common property is presumed to be the possession of all, and each cotenant has a right to rely upon such presumption, until the acts or declaration of the tenant in possession are palpably inconsistent with it.

COTENANCY—ADVERSE POSSESSION—NOTICE.—If one cotenant is distinctly notified that the cotenant in possession claims to own the common property absolutely, his adverse possession begins to run from such notice.

COTENANCY—ADVERSE POSSESSION.—Possession of land by the mother of the former deceased owner is adverse to the other heirs, when she claims the property absolutely, and all of the interested parties suppose that she is the sole heir of the deceased.

COTENANCY—ADVERSE POSSESSION—NOTICE.—If a cotenant distinctly states that he has nothing to do with the property in dispute, and that the sole title is in the tenant in possession, he has sufficient notice of the claim of ownership of the tenant in possession to make it adverse.

COTENANCY—ADVERSE POSSESSION—TACKING POSSESSIONS.—The title acquired by one of the cotenants of real property under a deed in severalty from a cotenant who has taken possession, under the belief of all of the cotenants that he is the absolute owner of the entire title, does not inure to the benefit of another cotenant, and the grantees may tack their possession to that of their grantor for the purpose of establishing a title by adverse possession, as against such other cotenant.

ADVERSE POSSESSION—OPEN AND NOTORIOUS OCCUPANCY.—Occasionally cutting and carrying away rails and firewood from land chiefly valuable for timber is not such an open, notorious, and continuous occupancy as may create a title by adverse possession.

ADVERSE POSSESSION—CONSTRUCTIVE POSSESSION —CUTTING WOOD.—Actual occupancy of a farm is not such constructive possession of a wood tract of land, distinct from and not connected with the farm, as may be made the foundation for an adverse possession of the wood tract, although the claimant procures wood and rails from the latter to use on the former.

W. M. Colvig, P. P. Prim & Son, and Flegel & Stanislawsky, for the appellants.

D. Brower, for the respondent.

[423] MOORE, C. J. This is a suit to quiet the title to certain real property. The material facts are: That on October 3, 1882, one Hobart Taylor died, intestate, in Jackson county, Oregon, leaving the following named persons as his only heirs at law: Abigail Taylor, his mother; S. C. Taylor, a brother; and the children of his deceased sister, Rachel, to wit, M. W. Wheeler, Myra A. Gilfillan, Elva C. Persons, and Frederick Mench. At the time of his death he was seised in fee, and entitled to and in the possession, of the following described real estate, to wit: Lots 7, 8, 9, 10, 11, 12, 13, and 14 in section 34; lots 4, 5, 6, 7, 8, and 9 in section 35; the donation land claim of Elisha Larson, No. 55—all in township 37 south of range 1 west; and also the southeast quarter of the southeast quarter of section 29, in township thirty-seven south, of range 1 east, of the Willamette meridian, in said county and state. At said time one S. H. Holt was living on the premises, having had a demise thereof for a term of one year, which expired October 1, 1882; and, on the 7th of that month, Abigail Taylor executed to him a written lease thereof for a term of two years from the expiration of the former term, and, in consideration thereof, he agreed to pay his said lessor, "her heirs [424] or assigns," the sum of three hundred dollars annually, and thereupon continued in possession of said premises until October 1, 1892, paying the rent therefor to Abigail Taylor or to plaintiffs. On July 21, 1885, the said Abigail executed to plaintiffs a warranty deed whereby she intended to convey to them all of said real estate, but, by mutual mistake, the southeast quarter of the southeast quarter of section 29, in township 37 south of range 1 east, was improperly described, as being in range 1 west. On December 11, 1888, S. C. Taylor died testate in said county; and, his last will and testament having been admitted to probate, the defendants, as his devisees and heirs at law, on December 6, 1893, claiming the interest which their ancestor inherited from his deceased brother, commenced actions for possession against one

W. T. Anderson, a tenant in possession of said premises, under a lease thereof from plaintiffs. Plaintiffs thereupon commenced this suit for the relief hereinbefore stated, claiming title to the whole of said real property by adverse possession thereof, by themselves and their grantor, for a period of more than ten years prior to the commencement of this suit. A trial being had, the court found for plaintiffs, and decreed that defendants had no right, title, claim, interest, or estate in or to said premises, or any part thereof, and perpetually enjoined them from in any wise interfering with the peaceable and quiet possession of said real property by plaintiffs, their heirs and assigns, and from instituting or prosecuting any actions to try the title to or recover the possession thereof, from which decree defendants appeal.

It is contended by defendant's counsel that Holt [425] retained possession of the demised premises by agreement with and consent of S. C. Taylor, and this acquiescence in the tenant's possession by their client's ancestor prevents the running of the statute until the lease under which he held terminated, October 1, 1884; and, such being the case, their actions for possession were commenced before the statute of limitations had run against their right of entry. Hobart Taylor having died intestate, and leaving neither wife, lineal descendants, nor father, his real property descended in equal shares to his mother, brother, and the children of his deceased sister, by right of representation, who thereupon became vested, as tenants in common, with the legal title to the real estate of which he died seised: Hill Annotated Laws, sec. 3098, subd. 3, sec. 3010. Tenants in common occupy toward each other a fiduciary relation, which demands of each fair dealing in everything pertaining to their interest in the common estate; and, while it is true that one cotenant may oust another, the amount of evidence necessary to prove the disseisin is much greater than in cases in which such relation does not exist: 1 Am. & Eng. Ency. of Law, 2d ed., 804; Sedgwick and Wait on Trial of Title to Land, sec. 278; Freeman on Cotenancy and Partition, sec. 166; Northrop v. Marquam, 16 Or. 173; Newell v. Woodruff, 30 Conn. 492. The reason for the existence of this rule is based upon the theory that when a stranger to the title takes possession of real property, no presumptions can be invoked that he is holding under or in pursuance of a license from or contract with the owner; but the law presumes that the possession of one cotenant [426] is the possession of all, to overcome which a greater degree of evi-

dence is required than in the case of an entry by a stranger to the title, with whom no contract relations have been entered into on the part of the owner; for, as was tersely said by Mr. Justice Story in Prescott v. Nevers, 4 Mason, 326 (Fed. Cas. No. 11390): "The law will not presume that one tenant in common intends to oust another. The fact must be notorious, and the intent must be established by proof."

As a corollary of this rule, it follows that an entry upon real property by a person claiming to be a tenant in common can never become the foundation of an adverse possession as against his cotenants until they have notice of his repudiation of their rights: 1 Am. & Eng. Ency. of Law, 2d ed., 805; Gross v. Washington (Tenn. Ch. App., Nov. 21, 1896), 38 S. W. Rep. 442; House v. Williams (Tex. Civ. App., Apr. 28, 1897), 40 S. W. Rep. 414. "When a tenant in common," says Mr. Justice Taft in Elder v. McClaskey, 17 C. C. A. 251, 70 Fed. Rep. 529, "claiming as such, enters upon the common land, he is exercising the right which his title gives him; and his resulting possession is presumed to be consistent with his avowed title, and therefore to be the possession of his cotenants and himself. His cotenants have the right to rely on this presumption until his acts or declarations are palpably inconsistent with it. The law fully recognizes that he may oust them, but he cannot do so except by acts so distinctly hostile to the rights of his cotenants that his intention to disseise is unmistakable." Where, however, a cotenant is distinctly notified that the tenant in possession claims to own the [427] land absolutely, his adverse possession begins to run from such notice: Weshgyl v. Schick, 113 Mich. 22.

Applying these rules to the case at bar, the important question presented for consideration is, whether the lease of October 7, 1882, was executed by Abigail Taylor for herself and S. C. Taylor with his permission, and, if so, when did she distinctly notify him that she claimed to own the land absolutely. The evidence tends to show that, the lease of the premises executed by Hobart Taylor to Holt having expired October 1, 1882, an agreement was entered into on that day between these persons by which Holt was to lease the land at an annual rental of three hundred dollars, without specifying the duration thereof, but no written lease had been executed at the time Hobart Taylor died. S. H. Holt, having been called as a witness, testified, in substance, that, on the day after Hobart's funeral, he explained to Abigail and S. C. Taylor the terms of the agreement entered into between the

deceased and himself in relation to the leasing of the premises; that both expressed a willingness that the contract should be carried out, and that he should have the land; that as he was under the impression and then considered he had to deal with Abigail and S. C. Taylor in relation to the property, as a matter of course he talked with both of them about the business, but, after he discovered that Mrs. Taylor had absolutely full control of the place, he came to a different conclusion as to whom he was obliged to deal with, and that S. C. Taylor thereafter had nothing to do with leasing or controlling the property in any manner, to his [428] knowledge; that Mrs. Taylor told him she believed she was the sole heir of her son, and, as such, was compelled to dispose of his property as he had intended; that S. C. Taylor informed him that his mother felt bad over the disposition she had made of his brother's property, and this statement, connected with the fact that he settled with and paid the rent to M. W. Wheeler, as Mrs. Taylor's agent, led him to believe that she considered herself legally in possession of the property.

The witness also says that he informed S. C. Taylor of his brother's desire to devise and bequeath his property to the Wheeler children, and that the deceased had requested him to draw a will to that effect; and, upon being told that no will had been prepared, S. C. Taylor remarked that it seemed rather hard, as he had assisted his brother in getting the land, and in looking after and caring for his stock, and that he felt he was especially entitled to a part of the horses. The evidence tends to show that some of these horses were delivered to him, but he wrote to M. W. Wheeler, who had just visited him, declining them, as is evidenced by the following excerpt from the letter: "Phoenix, Or., Jan. 12, '83. Dear Malon: You may think I am in a great hurry to write to you. Well, I have been thinking it over more and more since you left, and, the more I think, the more it troubles me to think that I contended for anything of my dear brother's estate. I do not want any of it. If my brother had wanted me to have anything, he would have said so. Now, please excuse me from taking the horses. I do not want them, nor anything else. My heart is the [429] lightest when I think I do not want the horses. You or grandmother can let them run here the same as ever, or do anything else with them you may see fit."

Rev. B. J. Sharp, a Methodist minister, who preached in the vicinity of S. C. Taylor's home soon after the death of Hobart, testifies that Abigail Taylor, who lived at Grant's Pass, and S. C. Taylor, who lived near Jacksonville, were members of his

church, and that Mrs. Taylor informed him that she feared her son felt unkind toward her because of her desire to carry out Hobart's intention to convey the title to the premises in question to her grandchildren, and requested the witness to see and talk with her son upon the subject; that, in pursuance of this request, he called upon S. C. Taylor, and informed him of his mother's apprehensions, and he told the witness that he relinquished all his interest in and made no claim to the property, and that he could not, on account of conscience, afford to thwart his brother's desire. William Mathews also testifies that a schoolhouse costing a hundred dollars had been built on the said land, and at the annual meeting of the electors of the school district in which it is situated, held in the spring of 1883, S. C. Taylor informed the persons then present that the right to erect the schoolhouse on said premises had never been obtained; that the title to the land was in his mother, who was quite aged and very feeble, in view of which he urged that immediate action should be taken to procure from her a title to the land occupied by the schoolhouse; that this witness, who was then school clerk of said district, was thereupon appointed by the electors to secure such 430 title, in pursuance of which he produced a survey of the land necessary for that purpose, and obtained from Abigail Taylor a conveyance thereof to the school district. This witness also says that, when Mrs. Taylor came up from Grant's Pass to Jacksonville, to execute a conveyance of the schoolhouse lot, she, with S. C. Taylor, called upon him, and the latter said that the Wheeler children had got all of his brother's property, and he had nothing to do with it.

This evidence, when considered as a whole, tends to show that Mrs. Taylor, believing that she alone inherited the real property of her son, and, considering that duty compelled her to make such a disposition of it as he intended, took possession of the premises in question on October 7, 1882, by Holt, as her tenant, under a claim of right to the whole thereof, and that S. C. Taylor, who seems to have been a very affectionate son, shared his mother's belief as to her right to the property; and, this being so, his permission to carry out the agreement of his brother with Holt, and his acquiescence in the lease executed by Mrs. Taylor, may be considered in the nature of advice to his mother as to the proper manner in which she should manage her property. If this is not so, however, and the leasing to Holt was a permissive possession, S. C. Taylor, in the spring of 1883, at the time of the school

meeting, had notice that his mother claimed the whole of his brother's real property in her own right; and, the actions for its possession not having been commenced within ten years from that date, the defendants' right of entry is barred, unless the conveyance [431] to plaintiffs from Abigail Taylor restored the possession of S. C. Taylor.

It is contended by defendants' counsel that plaintiffs, being cotenants with S. C. and Abigail Taylor, could not assert against S. C. Taylor any adverse title to the real property in question, and hence the possession which they obtained under their grandmother's deed inured to the benefit of their uncle. The evidence tends to show that neither S. C. Taylor nor the plaintiffs knew that they had inherited any interest in Hobart Taylor's estate, and each shared with Abigail Taylor the belief that she was the sole heir, and the latter, acting on this common belief and the acquiescence of her son and grandchildren therein, took possession of the said real property by Holt, her tenant, thereby ousting the other cotenants; that she thought it was her duty to carry into effect Hobart's intention in relation to the disposition of his real property, and, in pursuance of this conviction, she executed to plaintiffs a deed of general warranty, which purported to convey to them the whole estate in said premises; and the question presented is, whether these grantees, not in possession when the deed was made, can assert against defendants' ancestor any title thus acquired, and, if so, can they tack their subsequent possession to that of their grantor, so as to bar defendants' right of entry. The rule is well established that a tenant who is in or takes possession as such will not be permitted to assert against his cotenant's title an adverse claim to the common estate which he may have acquired, but that, by reason of the fiduciary relation existing between such persons, [432] a purchase of an outstanding title, when made by a tenant in possession, will inure, in equity, to the joint benefit of each cotenant, upon the payment within a reasonable time of a ratable portion of the purchase price: Van Horne v. Fonda, 5 Johns. Ch. 388; Venable v. Beauchamp, 3 Dana, 321; 28 Am. Dec. 74; Phelan v. Kelley, 25 Wend. 389; Sneed v. Atherton, 6 Dana, 276; 32 Am. Dec. 70; Weaver v. Wible, 25 Pa. St. 270; 64 Am. Dec. 696; Burhans v. Van Zandt, 7 N. Y. 523; Dray v. Dray, 21 Or. 59.

In Holdridge v. Gillespie, 2 Johns. Ch. 30, Chancellor Kent, in discussing this question, says: "Indeed, it is a general principle, pervading the cases, that if a mortgagee, trustee, tenant for life, et cetera, who has a limited interest, gets an advantage

by being in possession, 'or behind the back' of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust." In Coleman v. Coleman, 3 Dana, 298, 28 Am. Dec. 86, one Edward Coleman, being in possession of certain real property, which was devised to him and his brother William by their father, was evicted therefrom by the real owner, whose title he subsequently acquired; and it was contended that Edward having been a tenant in common with his brother, the purchase of the land after eviction therefrom inured to the benefit of William, upon his payment of one-half of the purchase price thereof; but it was held that the eviction destroyed the trust imposed upon them by the devise, and that this fiduciary relation was not restored by the subsequent acquisition of a permanent title. It has been held, however, [433] that a tenant in possession cannot take advantage of his position, and, without the consent of his cotenants, agree with the holder of a mortgage on the common property that the latter shall foreclose his lien, bid in the property at a sale thereof, and, after the time for redemption expires, reconvey the premises to him upon the payment of the mortgage debt and costs of foreclosure, and that a purchase made under such circumstances will inure to the benefit of the cotenants: Oliver v. Hedderly, 32 Minn. 455. In Wright v. Sperry, 21 Wis. 336, Mrs. Sperry, one of the defendants, being the owner of an undivided one-fourth of a tract of land, joined her husband in the execution of mortgages which purported to encumber the whole estate; and, the lien being foreclosed, plaintiff obtained a sheriff's deed to the entire tract. Thereafter Mrs. Sperry purchased the remaining interest in the land and placed the deed therefor on record, after which plaintiff purchased the interest of and secured a conveyance from a person who had obtained a tax deed to the whole tract; and it was contended that inasmuch as plaintiff was a tenant in common with Mrs. Sperry, he could not assert against her any adverse claim to their common estate; but it was held that as the mortgagors attempted to encumber the whole estate which, upon the foreclosure, passed by the sheriff's deed to plaintiff, he was not precluded from asserting against her an outstanding claim to the land. Downer, J., in deciding the case, says: "But neither the plaintiff nor his immediate grantor ever claimed as tenants in common, or admitted that Mrs. Sperry, or those who conveyed [434] to her since the foreclosure, had any interest as tenants in common in the premises. He claimed the whole premises before he bought in the

outstanding tax title. We hold, therefore, that within the spirit, if not within the letter, of the authorities we have cited, he had a right to purchase it for his exclusive benefit, and he must be presumed to have done so."

Applying the rules here announced to the case at bar, plaintiffs were not in possession of the locus in quo when they obtained a conveyance thereof; and, as possession is the chief unity applicable to tenants in common (Freeman on Cotenancy, 2d ed., sec. 86), their previous ouster by their grandmother without their procurement must necessarily have severed the fiduciary relations which theretofore existed between them and their uncle. The trust relations having been dissolved by this means, it would seem that they are not restored by the purchase of an adverse title by one tenant, unless he takes possession as a cotenant eo nomine, or there are some equities, either expressed in the deed or existing in pais, which would tend to show that the purchase was made in the interest and for the benefit of the other cotenants. Plaintiffs obtained a deed, believing that it conveyed to them the whole estate, under which they took and have held possession, not as tenants in common, but as absolute owners in fee of the entire interest in the land; and this instrument brings them into such privity with their grandmother as to permit them to tack their possession to that of hers, and thus bar the defendants' right of entry: Vance v. Wood, 22 Or. 77; Rowland v. Williams, 23 Or. 515; [435] Coventon v. Seufert, 23 Or. 548; Low v. Schaffer, 24 Or. 239; Clark v. Bundy, 29 Or. 190.

It is also contended by defendants' counsel that plaintiffs and their grantor have not been in the adverse possession of the southeast one-quarter of the southeast one-quarter of section 29 in township 37 south, of range 1 east, of the Willamette meridian, for a continuous period of ten years prior to the commencement of this suit. The evidence on this branch of the subject tends to show that this tract, which is situated about four miles from the other land, is unfenced and covered with timber from which wood and rails are obtained to be used for fuel, and in keeping in repair the fences on the farm; that the lease executed to Holt in October, 1882, recited that "he was to have wood for fuel," and, after stipulating for the payment of the rent reserved, also provided that "one hundred dollars of the above amount to be paid in hauling rails from the timber land on the mountain belonging to the farm." The next lease entered into with Holt contained similar provisions, in pursuance of which the tenant, as occasion demanded, obtained firewood and rails from this

forty-acre tract; and, as a witness, he says he thinks he could have prevented the owners of said tract from entering thereon; but in this opinion we think he is in error, for the lease does not provide that he shall have exclusive possession of the tract, the only reference thereto being the language above quoted. And it will be seen from this that when he had obtained such a quantity of firewood as he needed, and had hauled the number of rails provided for in the lease, it is quite evident that [436] he had no further use for the land; and, such being the case, the owners could doubtless have entered upon the same. It will be remembered that the deed executed by Abigail Taylor to plaintiffs failed properly to describe this tract; but if it be conceded, for the sake of the argument, that the mutual mistake in this respect conferred color of title thereto, the wood lot, not being connected with, is distinct from, the farm, so that an entry into and possession of the latter is not constructively an occupancy of the former: Wilson v. McEwan, 7 Or. 87; Hicklin v. McClear, 18 Or. 126; Willamette Real Estate Co. v. Hendrix, 28 Or. 485; 52 Am. St. Rep. 800; Farrar v. Eastman, 10 Me. 191.

It has been held that occasionally cutting and carrying away rails and firewood from land chiefly valuable for timber was not such an open, notorious, and continuous occupancy as would give title: Bartlett v. Simmons, 49 N. C. 295; Pike v. Robertson, 79 Mo. 615. Such being the rule of law, we do not think the evidence sufficient to warrant the conclusion that plaintiffs and their grantor have had such exclusive possession of the wood lot as to bar the defendants' entry, in view of which the decree must be modified as to this tract. Each of the plaintiffs is therefore entitled to an undivided eight-thirty-sixth part thereof, and each of the defendants, except Anna T. Stoddard, to an undivided three-thirty-sixth of said forty acres; the person so excepted having been the former wife of S. C. Taylor, accepted the provisions of his will in lieu of dower, and hence has no interest in said land. The decree will therefore be modified so as to invest the respective parties [437] with a title to the said wood lot in the proportions hereinbefore indicated, but in all other respects affirmed.

COTENANCY — ADVERSE POSSESSION BY COTENANT.— The possession of one cotenant is the possession of all, until he does some act of ouster to notify the others that his possession is exclusive: Cocks v. Simons, 55 Ark. 104; 29 Am. St. Rep. 28. To constitute an adverse possession between cotenants there must be an actual ouster, and an exclusion of the other cotenants by the one in possession: Mansfield v. McGinness, 86 Me. 118; 41 Am. St. Rep.

532. There must be a clear, positive, and continued disclaimer of title, and the assertion of an adverse right brought home to the knowledge of the others, although great lapse of time, with other circumstances, may warrant the presumption of a disseisin or ouster by one cotenant or other joint owner: Pillow v. Southwestern etc. Imp. Co., 92 Va. 144; 53 Am. St. Rep. 804, and note. An entry under a quitclaim deed purporting to convey the whole premises, though the grantor owned but a moiety, followed by the exclusive possession of the property, may constitute an ouster of the cotenants of the grantor, and result in a prescripive title in favor of the possessor: Fuller v. Swensberg, 106 Mich. 305; 58 Am. St. Rep. 481, and note.

ADVERSE POSSESSION—ESSENTIALS OF OCCUPANCY.—Occasional entries upon land, and the exercise of occasional acts of ownership, no matter how clearly they may indicate a purpose to claim title and exercise dominion over the land, do not constitute a notorious possession adequate to support a claim of title by prescription: Monographic note to De Frieze v. Quint, 28 Am. St. Rep. 161. The occasional cutting of timber and the exercise of other acts of ownership, such as men are accustomed to use over woodland, is not adverse possession: Bailey v. Irby, 2 Nott & McC. 343; 10 Am. Dec. 609; Wright v. Guier, 9 Watts, 172; 36 Am. Dec. 108, and note.

EX PARTE FINN.

[32 OREGON, 519.]

ATTORNEYS—DISBARMENT—WILLFUL MISCONDUCT. An attorney who affixes his official jurat as a notary public to affidavits which are not in fact sworn to before him, and files them in a case in which he is an attorney, is guilty of willful misconduct in his profession, for which he may be disbarred or suspended from practice, although the statements in such affidavits are true, and the case was decided on other grounds.

ATTORNEYS—DISBARMENT.—An attorney at law cannot justify his willful misconduct in his profession, and evade disbarment or suspension from practice therefor, on the ground that such conduct was usual in the practice of the law.

ATTORNEYS—DISBARMENT.—Proceedings for the disbarment of an attorney at law for misconduct in his profession are not entertained for the purpose of punishing the accused, but for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients.

C. M. Idleman, attorney general, for the petitioner.

T. H. Crawford and G. G. Bingham, for the respondent.

520 PER CURIAM. This is a proceeding instituted by the grievance committee of the State Bar Association to disbar the defendant from further practicing as an attorney before the courts of this state, for willful misconduct in his profession. After the issues were made up, the cause was referred to Hon. Robert Eakin, who took and reported the testimony, together

with his findings of fact and conclusions of law. The nature of the charges preferred sufficiently appears from the findings of fact, which are full, clear, and accurate deductions from the testimony submitted. Said findings, including a necessary modification of the seventh, are as follows: "1. That on or about the tenth day of October, 1896, there was pending in the said supreme court, on appeal, a suit in which Homer Nessley and others were plaintiffs and appellants, and Freeman S. Ladd was respondent, and that the said C. H. Finn was one of the attorneys of record for the said Freeman S. Ladd; that after the affirmance of the decree therein the said suit was pending upon a motion by the appellants to have the said cause reopened and referred back to the trial court to take further testimony on behalf of the said appellants, which motion was supported by the affidavits of E. S. McComas and R. W. Deal; and that on said tenth day of October, 1896, for the purpose of impeaching the said affidavits, and the character of the said E. S. McComas [521] and R. W. Deal for truth and veracity, said C. H. Finn furnished to his client, the said Freeman S. Ladd, a form for several affidavits, substantially to the effect that the subscribers, after being first duly sworn, each for himself, and not one for the other, solemnly swore that he was acquainted with the general reputation of E. S. McComas and R. W. Deal for truth and veracity in the community in which they lived, and that such reputation was bad. 2. That said Freeman S. Ladd secured the following named persons to sign the said affidavits, viz., F. Ousley, W. Berkely, A. Ferguson, C. McClure, Peter Kuhn, E. O. Crandall, G. W. Bartmess, F. M. Bartmess, and William Martin. 3. That none of the said parties who signed the said pretended affidavits signed the same in the presence of C. H. Finn, nor ever went before him to swear to said affidavits, and none of them were sworn to said affidavits by said C. H. Finn, but that the said C. H. Finn, on the tenth day of October, 1896, affixed his official jurat to the said affidavits in the following words and figures, viz.: 'Subscribed and sworn to before me this tenth day of October, 1896. C. H. Finn, notary public for Oregon,'—and in attestation thereof affixed thereto his notarial seal as notary public for the state of Oregon. 4. That thereafter the said C. H. Finn, as one of the attorneys for the said Freeman S. Ladd in said suit, caused said pretended affidavits to be filed in the supreme court of the state of Oregon in the said suit. 5. That the said E. O. Crandall, whose name appears on two of said affidavits, signed the said two affidavits at the request of Freeman S. Ladd at the office of

said C. H. Finn, but in the absence [522] of said Finn; that he read the said affidavits before signing them, but did not know when they were so signed where they were to be used; that about an hour thereafter C. H. Finn saw the said Crandall, and asked him if he had seen Freeman S. Ladd, and he replied that he had and had signed the papers; but that the said Crandall did not swear to the said affidavits, or either of them. 6. That said Charles McClure signed one of said affidavits, relating to the impeachment of the character of R. W. Deal for truth and veracity, on the said tenth day of October, 1896, on a street of La Grande, at the request of said Ladd; that he told said Ladd that he would not make oath to it; that he did not swear to it, and that he did not see C. H. Finn in relation thereto either before or after he signed the same. 7. That said F. M. Bartmess signed one of said affidavits, relating to the impeachment of the character of the said R. W. Deal for truth and veracity, on a street of La Grande, at the request of Freeman S. Ladd, on about October 10, 1896; that he heard it read before he signed it; that he did not swear to it before the said C. H. Finn, but that Finn asked him within a few days whether he had signed it. 8. That said Peter Kuhn signed one of said affidavits, relating to the impeachment of the character of said R. W. Deal for truth and veracity; that he did not know when he signed the same that it was to be used in the supreme court; that C. H. Finn was not present when he signed the same, and he did not swear to it; that he did not see C. H. Finn in relation to the same at any time; that he would have sworn to it if he had been called on for that purpose, but that [523] he did not know that it was to be an affidavit, or sworn to. 9. That said William Martin signed both of said affidavits, relating to the impeachment of the character of R. W. Deal and of E. S. McComas for truth and veracity, on about the tenth day of October, 1896, at the request of Henry Dray, and delivered them to Freeman S. Ladd; that he did not swear to them, nor at any time talk with Mr. Finn in relation thereto until two months after the signing thereof; that he would have sworn to them if he had been asked to. 10. That said W. S. Berkely signed the said affidavit relating to the impeachment of the character of R. W. Deal for truth and veracity at the request of Freeman S. Ladd; that he did not know it related to the Hilts case in the supreme court; that he did not swear to it, and Mr. Finn was not present, and that he did not see Mr. Finn in relation thereto at any time. 11. That the other signers of the said affidavits were not brought before the referee. 12. That each of

said signers of said affidavits, viz., Crandall, McClure, Bartmess, Kuhn, and Berkely, understood what was contained in the statement he signed, and believed it to be true. 13. That the said C. H. Finn, in preparing said affidavits and sending them to the supreme court as he did, did not intend to get a false statement of facts before the supreme court; nor did he intend by false testimony to induce the court to discredit the statements of Deal and McComas. 14. But that he did know that said pretended affidavits were not affidavits, but intended that the court should receive and act on them as such."

The defendant testifies that he saw Crandall, and [524] asked him whether he had signed the affidavit, to which he answered that he had, and that he assented to it. That he also saw Martin and F. M. Bartmess, and perhaps G. W. Bartmess, and asked them about their signatures—whether they had signed—and that it was his recollection he said to some of them: "You swear to this, do you?" to which they gave their assent (he does not remember to have seen Kuhn, McClure or Berkely at all); that after appending his jurat to the affidavits he took them from La Grande over to Union, and laid them upon Mr. Crawford's desk (his co-counsel in the case of Nessley v. Ladd, 30 Or. 564), not intending that they should be used until he had seen all the affiants, so that no advantage could be taken of him, and that they were sent off without his knowledge; that when he became aware of what had been done with them, he undertook to call the attention of the supreme court to the matter by letter directed to the chief justice, for the purpose of preventing any action being taken upon the strength thereof.

The findings of fact are scarcely controverted, but it is contended: 1. That the statements contained in the affidavits were all true, as a matter of fact; and 2. That they were wholly immaterial and irrelevant, and could not be considered upon the question of a rehearing then pending before this court, and, consequently, that the court could not have been misled thereby. Both these propositions may be conceded, as the motion in the Nessley-Ladd case, 30 Or. 564, was disposed of upon a question of law. There was a question of fact presented, however, and the affidavits were intended to countervail, [525] in part, at least, the appellant's showing of newly discovered evidence upon which the motion was based, and a real contention existed, to which the supposed affidavits were pertinent. There was also an ultimate purpose to be subserved in filing them, and it cannot avail the defendant that the matters of fact sought to be controverted

thereby proved to be immaterial to an adjudication upon such motion: In re Houghton, 67 Cal. 511, 516.

That the pretended affidavits filed for the consideration of the court were not such in fact will hardly admit of argument. "An affidavit is a written declaration under oath, made without notice to the adverse party": Hill's Annotated Laws, sec. 803. And the oath is administered by addressing to the affiant a prescribed formula, which may be varied to suit the occasion, whereby he is called upon to attest with uplifted hand the truth of what he is about to assert, under an immediate sense of his responsibility to God: Hill's Annotated Laws, secs. 867, 868. To make such a document legal and authoritative in a court of justice, it takes both the affiant and officer authorized to administer the oath, acting together; and the oath must be either administered by the officer to the affiant, or asseveration must be made to the truth of the matters contained in the affidavit, by the party making it, to the officer, with his sanction: Matthews v. Reid, 94 Ga. 461; Carlisle v. Gunn, 68 Miss. 243. Without a direct administration of the oath, there can be no affidavit, under the statute. And, while a nonobservance of the exact formula in its administration may not relieve the affiant of legal responsibility under [526] it (Dunlap v. Clay, 65 Miss. 454), yet it is plain that there must be some actual and bona fide attempt at a due observance of the law's requirements, to give validity to the document as an affidavit. In the present case there is no pretense that any such attempt was made as to several of the parties signing the purported affidavits. The defendant says that it was his remembrance that he said to some of them (he could not recall to whom), "You swear to this, do you?" and was answered in the affirmative. But in this he is flatly contradicted by the parties themselves, and it is probable that he made no attempt in either case at the administration of an oath. Crandall, and perhaps one or two others, who were asked if they had signed these papers, indicated that they had, and this is the nearest any of them came to making oath to their contents; but, notwithstanding, the defendant appended his jurat thereto, and signed and sealed the same as a notary public, so that upon their face the documents have the appearance of genuine affidavits, when in fact they are not.

With full knowledge of their true condition, the defendant caused them to be filed for the purpose of influencing the court in favor of his client upon the pending motion. Does what is related constitute willful misconduct on the part of the accused

in his profession? If it does, he is amenable to the court under the charges preferred against him; otherwise not. The documents are not false in substance, but they are not genuine in so far as they purport to be the sworn statements of the individuals subscribing them. If they had been filed in the form of mere [527] statements or representations, there could have been no possible culpability ascribed to the defendant, but in that condition they would not have been effective for any purpose; and this the counsel knew as well as anyone, for he is by no means ignorant of the practice. The very obvious purpose, however, in presenting the statements in the form of affidavits and under the apparent sanction of an oath was to give them the weight of testimony taken ex parte, and entitle them to the consideration of the court. The condition is similar to that of an officer certifying that he had taken the deposition of a party, and that, before proceeding to take the same, the witness had been by him duly sworn, when in truth and in fact the officer had not seen the witness, nor at any time attempted to administer an oath to him touching the statements made; the only distinction being that the deposition is a higher grade of testimony, in that an opportunity is given for cross-examination. To present such a deposition would be a representation to the court that it was the genuine testimony of the witness, regularly taken under the sanction of an oath, when in truth and in fact it was not at all entitled to consideraion as testimony in the case, and could not, under the rules of practice, affect in any manner the matters in dispute. Such is the effect of the presentation of the pretended affidavits as genuine, while lacking the sanction of an oath. There is a twofold falsity in the proceeding. It comprises a false certificate of the administration of an oath, and a false representation that the statements produced are the sworn testimony of witnesses or supposed affiants, entitling them to the [528] consideration of the court. That an attorney is culpable who seeks thus to maintain his cause there can be no contention. Such practice is not consistent with truth, nor does it conform to right principles of fair dealing, and is well calculated to impose upon, overreach, and mislead the court into a perversion of justice. Conduct in an officer which may lead to such an end cannot receive the sanction of the court as correct.

The defendant seeks to excuse or palliate his conduct, as it respects his certification of the alleged affidavits, by asserting that the manner in which he obtained the assent of the affiants

thereto was the usual manner of administering oaths in such cases. If this is true, there is a signal vice in the practice; and as was said by Finch, J., in In re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558, "it would only make our duty all the more imperative" that the vice may be eradicated. It is due to the profession, however, to say that no such practice has been established. But in any event it could afford but slight excuse for its adoption by an attorney of long practice in the courts of justice. Again, he says that he did not intend that the affidavits should be filed until he had seen all the parties, and that as soon as he ascertained that they had been sent away he undertook to call the attention of the court to the matter, and to withdraw them from its consideration, so far as he was able. Facts contained in the record are not in apparent harmony with these statements in detail. The affidavits themselves bear date October 10, 1896, and were filed in this court the 14th of the same month. Other affidavits [529] of several of the alleged affiants, stating the manner in which their signatures were obtained, were taken on the 16th, 17th, and 18th of November, and filed here on the 28th of the same month—the same day upon which defendant's letter to the chief justice bears date. It is hardly probable that, with a bona fide intention of seeing the other parties, he completely lost sight of the affidavits for the space of more than six weeks, and that in the mean time he was ignorant of the fact that they were filed in court. But he writes: "I am now informed that many of the affiants have retracted, for the purpose of screening themselves, by swearing that they did not make oath to their former affidavits. Upon ascertaining this fact, I made due inquiry of them, to ascertain their object, and learn that they were intimidated by the appellants—induced to believe that unless the affidavits were subscribed in the presence of the notary, and oath administered with uplifted hand, precisely in the manner of swearing a witness in open court, it did not constitute an oath, and their declaration in the affidavits, of 'being first duly sworn,' constitutes perjury, for which they have been threatened with criminal prosecution." Here is inherent proof that the motive which induced the sending of the letter was not altogether the one ascribed. And it is not at all probable that the letter would have ever been indited, had it not been that the manner in which the affidavits had been obtained was about to be disclosed to the court, or, taking a more charitable view, it was doubtless this fact that aroused his sensibilities of the real condition of

the transaction, and of [530] his own connection therewith. It is evident that he had no intention of asking a withdrawal of these papers, except as a means of extricating himself from the charges of professional misconduct which followed. In this connection it may be remarked that there is not a scintilla of pertinent evidence in the record that any of such witnesses had been intimidated, or threatened with criminal prosecution, although direct inquiry was made of those sworn touching the matter.

His course has not been altogether consistent and candid in other respects. His letter represents that he had, prior to the time the affidavits were forwarded, approached the affiants with the inquiry as to whether the documents contained their signatures, and if they swore to them, "except probably one or two instances," and each answered that he did. In his testimony he is not positive whether he asked any of them if they swore to their respective affidavits, and is not certain of having seen more than three of the purported affiants, but thinks he saw four, and does not pretend that he had seen any others; but the testimony against him contains strong proof that he did not even so much as see more than two of them. He further writes that: "Rather than the respondent's case should be prejudiced in any manner, I prefer to withdraw the affidavits, or that they be not considered on the rehearing." The more direct way, and the one suggested by candor, would have been to have filed a motion in the case, with the clerk, for leave to withdraw the objectionable papers from the files, or that they be stricken therefrom, knowing that they were [531] not what they purported to be. The chief culpability about the transaction, confining the proof to the charges preferred, is that it shows a reckless and willful disregard of the regularity of the means employed for the accomplishment of ultimate purposes. Furthermore, it shows a deliberate willingness to permit the court to be deceived and misled by the consideration of fictitious documents and evidence, for the production of which the accused is solely and directly responsible. Such reckless demeanor by an attorney is not consistent with professional ethics or obligations, and constitutes, as we are led to conclude, willful misconduct in his profession. This seeming disregard for truth, we regret to say, has characterized the defendant's subsequent demeanor as it respects the matters charged against him.

We have examined this case in detail, with great care and consideration, that no injustice may be done the defendant; and,

while the duty of passing judgment is a delicate and unpleasant one, our duty to an honorable profession, and the need of preserving unsullied that high standard of truth and purity by which alone an officer of justice should be measured, demand firmness in declaring the result. It is not the purpose of proceedings of this character to punish the accused attorney, as in matters of criminal cognizance, but they are inaugurated and entertained as "necessary for the protection of the court, the proper administration of justice, and the dignity and purity of the profession, and for the public good and the protection of clients": Weeks on Attorneys at Law, sec. 80. We have determined that a suspension will [532] accomplish the purpose of correcting the evil in the present case, and therefore direct that the defendant be suspended from practice in all the courts of the state for the period of one year. An order will be entered accordingly.

IN THE CASE of Ex parte Kindt, 32 Or. 474, it appeared that he, as attorney for the executors of the estate of Miles Davies, deceased, presented to his clients a false and fraudulent check and affidavit, for the purpose, and with the design, of inducing them to believe, and as evidence, that a certain note belonging to such estate, and executed by the said Kindt, had been paid. Upon proceedings for his disbarment for unprofessional conduct, the supreme court said: "It is unnecessary to comment upon the conduct of the defendant as disclosed by this record. It unmistakably appears that while attorney for the estate of his grandfather, and therefore charged with the duty of protecting its interests, in gross violation thereof, he designedly and deliberately concocted and attempted to carry out a scheme to rob and defraud his client by means of false and forged evidence. That such a person is unworthy to be a member of the bar goes without saying. Justice to the court, protection to the public, and the honor of the profession alike inexorably demand that he be summarily removed, and his license revoked, and it is so ordered."

In the case of Ex parte Ditchburn, 32 Or. 538, it appeared that John Ditchburn, a licensed attorney, was retained to prosecute an appeal from a judgment rendered in a circuit court, and as such attorney undertook to procure for his client sureties in an undertaking on appeal. He signed two sureties' names to the undertaking, and, as he claimed, delivered it to a notary public, for him to obtain from such sureties the necessary affidavits as to their qualifications, but such notary, with the knowledge of such attorney, made no attempt to carry out these instructions, and attached his seal and subscribed his name to the jurat as if he had secured their oaths, without, in fact, securing their affidavits. Ditchburn claimed that he was not a party to the scheme, but the supreme court held that he was guilty of unprofessional conduct, and ordered that he be suspended from practice as an attorney for the term of six months. The court in deciding the case said: "Unprofessional conduct on the part of an attorney involves a breach of the duty which professional ethics enjoin. It has been held that it may consist in betraying the confidence, taking advantage of, or acting in bad faith toward, his client; in attempting, by any means, to practice a fraud, impose upon or deceive the court, the adverse

party, or his counsel; in introducing testimony which he knows to be false or forged; tampering with or suborning witnesses; fraudulently inducing them to absent themselves from and avoid attendance upon courts when it is suspected or known that their testimony will or may be prejudicial to him or his client; in applying abusive or insulting language to, or assaulting or threatening to chastise, the judge concerning his judicial action; and, in fact, any conduct which tends to bring reproach upon the legal profession, or to alienate the favorable opinion which the public should entertain concerning it: In re Snyder, 24 Fed. Rep. 910; In re Keegan, 31 Fed. Rep. 129; In re Serfass. 116 Pa. St. 455; People v. Spencer, 61 Cal. 128; In re Burris, 101 Cal. 624; Penobscot Bar v. Kimball, 64 Me. 140; Beene v. State, 22 Ark. 149; State v. Kirke, 12 Fla. 278; 95 Am. Dec. 314; People v. Green, 7 Colo. 237; 49 Am. Rep. 351; Burns v. Allen, 15 R. I. 32; 2 Am. St. Rep. 844; In re Philbrook, 105 Cal. 471; 45 Am. St. Rep. 59; Rice v. Commonwealth, 18 B. Mon. 472; Bar Assn. v. Greenhood, 168 Mass. 169." The court also cited In re Arctander, 26 Minn. 25, and In re Hurst, 9 Phila. 216, as being in point as to the case in hand.

ATTORNEY AND CLIENT — DISBARMENT—NATURE OF PROCEEDINGS.—The power of disbarment is not exercised by the courts for the purpose of enforcing remedies between parties, but to protect the courts and the public against the official ministration of an attorney guilty of unworthy practices: See monographic note to In re Philbrook, 45 Am. St. Rep. 74, on grounds of disbarment of attorneys and counselors at law; monographic notes to State v. Kirke, 95 Am. Dec. 335, and Burns v. Allen, 2 Am. St. Rep. 850.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

MEARSHON *v.* POTTSVILLE LUMBER COMPANY.

[187 PENNSYLVANIA STATE, 12.]

CORPORATIONS, FOREIGN—DOING BUSINESS IN ANOTHER STATE THROUGH AGENT.—A corporation of one state may send its agents to another state to solicit orders for its goods or contract for the sale thereof, without being embarrassed or obstructed by state requirements as to taking out licenses, filing certificates, establishing resident agencies, or like conditions.

CORPORATIONS, FOREIGN—INTERSTATE COMMERCE. Limitations imposed by a state upon the power of a corporation created under the laws of another state to make contracts within the state for carrying on commerce between the states violates that clause of the federal constitution which confers upon Congress the exclusive right to regulate such commerce.

CORPORATIONS, FOREIGN—DOING BUSINESS IN ANOTHER STATE THROUGH AGENT.—A foreign corporation having all of its capital invested in the state of its origin may execute orders taken by its agents for the delivery of goods in another state, without complying with a statute of that state requiring a foreign corporation doing business within the state to appoint a resident agent therein.

J. W. Moyer and J. W. Whitehouse, for the appellant.

W. K. Woodbury, for the appellee.

15 GREEN, J. The questions of fact on the merits of this case were carefully and correctly submitted to the jury by the learned trial judge, and were found for the plaintiff, and no discussion is needed in regard to those matters. The only question presented by the assignments of error is the correctness of the ruling upon the points reserved. The learned court below held that the transaction involved in this case was not a doing of busi-

ness by a foreign corporation in this state within the meaning of the acts of April 22, 1874 (Pub. Laws, p. 108), and of June 1, 1889 (Pub. Laws, p. 420), and therefore the plaintiff could recover, notwithstanding he had no agent within the commonwealth at the time of the trial. The plaintiff had complied strictly with the requirements of the law, and had an agent, duly authorized, in the state, at the time the contract in question was made, but the agent had removed from Pennsylvania before the delivery of the goods or the bringing of the suit, and this, it was contended, was not a compliance with the law. Passing by that question the case was ruled upon the authority of Blakeslee Mfg. Co. v. Hilton, 5 Pa. Sup. Ct. 184. There are other cases, which will be referred to presently, to the same effect, and we are of opinion that the decisions in all of these cases are correct, and should be followed by us in deciding the present controversy. The plaintiff in that case was a foreign corporation located in the state of Illinois, and the action was brought to recover the price of a steam pump manufactured in that state and sold to the defendant, a corporation, in Pennsylvania. Among other defenses set up in the affidavit of defense [16] was the allegation that the plaintiff was a foreign corporation and had not complied with the requirements of the act of 1874 in reference to establishing an office and appointing an agent within the state. Mr. Justice Wickham, delivering the opinion of the court, said: "All that is hereby alleged is entirely consistent with the conduct of a foreign corporation engaged in strictly interstate commerce. It may advertise its goods, take orders, make contracts of sale respecting the same, and ship them to customers in this state. It may also employ agents living in Pennsylvania to go from county to county, from town to town, and from person to person to secure orders. Or the agent may never go outside of his own county, city, or town, thus being in one sense a local agent, and yet be doing a business which is not and cannot be reached under our act of 1874. The words 'doing any business,' as used in the act, should not be construed to mean taking orders or making sales by sample by agents coming into our state from another for that purpose. To hold otherwise would make the act offend against the constitution of the United States as imposing unlawful restrictions on interstate commerce: Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; Robbins v. Shelby Tax. Dist., 120 U. S. 489; Brennan v. Titusville, 153 U. S. 289, and a number of other cases. The above and numerous other decisions of the supreme

court of the United States and of the highest state tribunals fully establish the rule that a corporation of one state may send its agents to another to solicit orders for its goods, or contract for the sale thereof, without being embarrassed or obstructed by state requirements as to taking out licenses, filing certificates, establishing resident agencies, or like troublesome or expensive conditions." The facts of the case cited are quite similar to those of the case at bar, and we regard the foregoing decision as quite in point, and controlling the question at issue. An entirely similar ruling was made in the case of Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, where it was held that a state which imposes limitations upon the power of a corporation created under the laws of another state to make contracts within the state for carrying on commerce between the states violates that clause of the constitution which confers upon Congress the exclusive right to regulate that commerce.

The constitution and legislation of Colorado contained very [17] similar provisions to our own, and the plaintiff, without complying with their requirements, made the contract in question. It was held that the making of such a contract did not constitute a carrying on of business such as was prohibited by the constitution and law of Colorado. The other cases cited are to the same effect. Substantially we decided the same question in the same way in Kilgore v. Smith, 122 Pa. St. 48. The plaintiffs claimed title through a packing association which was a corporation located and incorporated in the state of Maryland, and the contention was, that a good title could not be derived from that company because it had not complied with the requirements of our law relating to foreign corporations doing business in our state. But we held that such a corporation, having no part of its capital invested in our state, was not subject to the provisions of the act of 1874. On this subject, Paxson, J., delivering the opinion, said: "The learned judge below was of opinion, and so instructed the jury, that the corporation in question was not doing business in this state within the meaning of the act of assembly. In this we think he was entirely right. One of the objects of the act of assembly was to bring corporations employing their capital in this state and doing business here within the taxing power of the commonwealth. It does not appear that this corporation brought any of its capital into this state. Its place of business was in Maryland. Its capital, if it had any, was there. It had contracts with some of its members residing in Pennsylvania by

which they were to can their fruit and hold the same to be disposed of by the corporation."

In the case at bar these remarks are of still more force. The plaintiff is a corporation duly incorporated in the state of Michigan. Its manufacturing operations are there conducted; its capital is there invested. None of it is invested here. The order for the goods in question was given to its salesman and agent in Pennsylvania, and by him sent to the plaintiff, who executed the order in Michigan. Under all the decisions this is not a doing of business in this state which makes it necessary to comply with the provisions of the act of 1874, and hence the defense made on that ground has no merit. The question seems very plain, and enough has been said to justify the decision of the superior court.

The judgment is affirmed.

CORPORATIONS—FOREIGN—RIGHTS OF STATE OVER—REGULATION OF INTERSTATE COMMERCE.—The power of a state to prevent the making of contracts within its borders by foreign corporations, or to impose such terms as it may deem expedient, provided they do not conflict with the exclusive powers of Congress, is well recognized: Daggs v. Orient Ins. Co., 136 Mo. 382; 58 Am. St. Rep. 638, and note. But the power of Congress to regulate commerce includes commerce carried on by corporations as well as commerce carried on by natural persons, and a state can no more regulate commerce carried on by the former than such commerce carried on by the latter: Gunn v. White Sewing Machine Co., 57 Ark. 24; 38 Am. St. Rep. 223; and a state cannot impose restrictions upon the doing of business within its borders by foreign corporations, which restrictions are in effect regulations of interstate commerce: See monographic note to People v. Wemple, 27 Am. St. Rep. 564; Commonwealth v. Smith, 92 Ky. 38; 36 Am. St. Rep. 578, and note.

HALL *v.* CHAMBERSBURG WOOLEN COMPANY.

[187 PENNSYLVANIA STATE, 18.]

CONTRACTS VOID FOR AMBIGUITY.—A contract reciting that one party has bought of another party "all the colored noils for the year 1887, at forty cents, to be delivered monthly," which one of the parties contends was a purchase of the output of his mill for that year, while the other contends that it was a purchase of such noils as he required in the course of his business during such year, is void for ambiguity, and by itself and without competent evidence to make it certain cannot be made the basis of an action.

EVIDENCE—DEATH OF AGENT.—In an action upon an ambiguous contract, evidence as to the way in which it was understood by a member of a firm with whom it was made, and who has since died, is inadmissible.

EVIDENCE—BOOKS OF ACCOUNT.—Under a special contract to deliver goods periodically in future, the seller cannot prove the deliveries by his books of original entry. Such delivery must be proved by independent evidence.

O. C. Bowers, and W. W. Brewer, for the appellants.

D. W. Rowe, W. R. Gillan, J. D. Ludwig, and E. J. Bonbrake, for the appellees.

[19] DEAN, J. The plaintiffs were merchants, dealers in wools, noils, and material used in the manufacture of woolen goods, in Philadelphia. The defendants were manufacturers of woolens in Chambersburg, Pennsylvania. Plaintiffs had been furnishing to defendants materials for the manufacture of woolens in the year 1886, and in November of that year arranged with John Huber, the president of the company, to furnish colored noils for the year 1887.

The averment of contract is founded on this paper:

"Chambersburg, November 6, 1886.

"Bought of William Hall & Co., all the colored noils for the year 1887 at 40 cents to be delivered monthly.

"JOHN HUBER, Pres.
"WM. HALL & CO."

The plaintiffs received these noils from the mill monthly, during the first part of the year 1887; sometimes they were stored in their warehouse in Philadelphia, awaiting an order for shipment; and sometimes shipped to defendants immediately. Up to August 9, 1887, all that were shipped were received by defendants and paid for. On August 9, plaintiffs sent a bill or invoice of a shipment at that date, amounting to eight hundred and forty-three dollars and seventy-five cents. On receipt of this bill, defendants replied, acknowledging it, with this request, "Please do not store any more for us until ordered to do so." To this, plaintiffs, on August 13, replied: "We will stop storing the noils as we have been doing, and forward them to you every month on their arrival. Shall we ship the lot that is here up?" To this, defendants, on August 18, replied: "Will you please send us statement of our account [20] for all unsettled bills, excluding the goods stored here and in the city, and store no more for us until further orders, as we have as many colored noils stored here as we can use until 1st of January." To this, plaintiffs replied, inclosing statement for those stored in Philadelphia and at Chambersburg, and requesting payment, and further stating the contract in this language: "In reference to the noils, would say that in January last, acting under instructions of your late president, Mr. John Huber, we contracted for you with the maker of the noils for what they made this year, and, as the contract has

several months to run yet, we will have to bill the noils to you until contract expires."

The plaintiffs continued to store the noils for defendants, and forwarded to them bills for the same monthly as they were received, and charged them to defendants on their books, for the remainder of the year. Beginning with the bill of August 9th, defendants refused to receive and pay for them. Thereupon plaintiffs brought suit. At the trial in the court below, plaintiffs offered their books of original entry as evidence to show the amount of noils sold and delivered to defendants, and dates of such delivery and sales. On objection by defendants: first, that the books were not evidence to show the sale and delivery of goods under a special contract; and second, were not evidence of themselves to show a storage of them for defendants, they were rejected, to which plaintiffs excepted.

The defendants were a partnership, composed of many members, several of whom were dead at the time of trial; John Huber, the president, with whom plaintiffs allege much of the conversation had occurred with respect to the contract, had also died; as a result, some evidence offered by plaintiffs was excluded, leaving their case to rest mainly on the evidence of the alleged contract of November 6, 1886, with whatever interpretation, might inferentially have been argued, was put upon it by the parties themselves in their subsequent correspondence. On this evidence, on motion of defendants' counsel, the court nonsuited plaintiffs, and afterward refusing to take off the nonsuit, we have this appeal with an assignment of eight errors, which may be reduced practically to two: 1. Did the court err in its opinion of the contract? 2. Did it err in rejecting as evidence plaintiffs' book of original entries?

[21] As to the contract, the court says: "However ambiguous it may be, there is nothing in the evidence which relieves it to any extent of its ambiguity—nothing to carry it to the jury. As we read it, it is an undertaking on the part of the defendants, a company engaged in the manufacture of woolen fabrics, to purchase from the plaintiffs, who were dealers in materials, all the colored noils they would require in the course of their business as manufacturers during the year 1887, to be delivered in monthly installments, at forty cents per pound. It has not been shown that the defendants failed in any respect to comply with their agreement, or that they failed to pay for any noils they received, or that they received any from any other source, or

that they ever received from the plaintiffs any of the noils sued for in this action."

The plaintiffs contended that the contract on part of defendants was to take in, in the year 1887, all the noils constituting the output of the Asa Pack & Co. mill of Providence, Rhode Island, not to exceed, however, the output of the year 1886, and if that output fell below the needs of defendants, then plaintiffs were to make up the quantity by purchases from other sources.

The defendants contended that they were to take only all the noils they might need for the year 1887, and this quantity they had taken. This was far less than the output of the mill named.

The written contract of November 6, 1886, is palpably ambiguous, as the court decided. No verdict could, with even proximate certainty of the truth, be founded upon it alone. In fact, appellants' argument, in effect, conceded this, for it is sought, first, to supplement the contract by the testimony of John Hall, one of plaintiffs, that when Mr. Huber, president of defendant company, made the contract, it was the understanding and agreement that the words, "all the colored noils for the year 1887," meant all the noils manufactured by the Peck & Co. mill. This testimony, on objection by defendant, was properly excluded, because Huber, the partner with whom it was alleged the agreement was made, was dead. Nor was there any other competent evidence tending to make certain the uncertainty of the written contract. A careful reading of the subsequent written correspondence throws no light on the [22] question; it only shows that each party sought to put its own interpretation on the contract, so that the learned judge of the court below, when he held that there was nothing in the evidence which relieved the contract from its ambiguity, committed no error; there was not enough in the contract and the evidence to support a verdict.

The next question is, Did the court err in rejecting plaintiffs' book of original entries? It appeared from the books that after the refusal of defendants to receive consignments of noils, plaintiffs continued for the remainder of the year 1887 to store in warehouses the product of the Peck & Co. mill and charge them in their books as for goods sold and delivered. In the absence of a special contract, the books would prima facie have been evidence of the sale and delivery of the goods, for the account is the ordinary formal charge, "Chambersburg Woolen Co. Bought of Wm. Hall & Co."

The reasons given for excluding the books are very concisely and clearly expressed by the court, thus: "This evidence is rejected, because the books at best are but secondary evidence, and are only admitted in the absence of the primary evidence because of necessity. In this case, a written contract of sale is in evidence, and the delivery of the subject matter of the contract to the defendants cannot be proved by the books, but must be established by independent evidence. Secondly, the contract of sale is an express contract for the sale of an article not in existence at the time of the sale, but to be manufactured and made in the future. No property therein passed to the vendee until made or manufactured, and either actually delivered to the defendants or at least set aside to them and accepted by them, and therefore, except upon proof of such acceptance, it could not be the subject of book entry."

This ruling is sustained by all the authorities. The leading case in our state, Lonergan v. Whitehead, 10 Watts, 249, has been followed ever since it was decided. There, by a special contract, Whitehead undertook to deliver to Lonergan bottles at regular list of prices, at rate of four gross per day, to the value of four hundred and fifty-nine dollars and forty-three cents. It was admitted that all had been delivered except ten gross. Whitehead offered in evidence his book of original entries to prove the delivery of all the bottles under the contract; the court below admitted it; this court reversed the [23] judgment, saying: "The evidence is admitted from necessity; for, according to the usual mode of doing business, the sale and delivery, being cotemporaneous acts, commonly take place when no other persons are present, and are consequently susceptible of no other proof. But no case has been cited where such testimony has been admitted to prove a delivery of an article made in pursuance of a previous contract. Here the contract was in writing for the delivery of a quantity of bottles to the purchaser as they were manufactured, at different times and at distant periods, and the only question is whether the vendor performed the contract. The reasons on which the cases cited are ruled do not apply, for there is no necessity to resort to such proofs, and it is not according to the usual course of business. The delivery is a matter of notoriety, done through the agency of others, and therefore easily proved by disinterested witnesses. The carman or persons employed take, or ought to take, receipts, and, when this precaution is neglected, the agent may be called to prove the delivery. It has never been supposed, when a contract is for

the delivery of wheat or flour or any other article of this description, at a future time, that the common-law proof of performance can be supplied by such testimony; it would be evidence of the most dangerous kind."

This was followed by Nickle v. Baldwin, 4 Watts & S. 290, where there was a special contract for the delivery of saw logs. Defendant, to sustain a setoff, offered his book of original entries to show the value and quantity of logs delivered under the special contract; this court says, expressly approving Lonergan v. Whitehead, 10 Watts, 249: "By a special agreement of this kind, the transaction is taken out of the usual course of buying and selling, and the performance of it by one and the breach of it by the other are susceptible of proof by the usual kinds of evidence. No reason of necessity or convenience exists for resorting to this peculiar kind of evidence, whether it be to establish the quantity of the article furnished or any other ingredient in the party's case." These cases are followed by many others in an unbroken line, down to Stuckslager v. Neel, 123 Pa. St. 53. There is nothing in the facts to take this case out from the operation of the general rule. It was incumbent on the plaintiffs to prove the special contract which they alleged, [24] and on which they relied, and that they performed it, by other evidence than their own declarations on their books. In fact, such proof went to the length of explaining the meaning of the ambiguity in the contract by their own declarations, to which meaning there was no evidence that defendants assented.

The plaintiffs argue that, even in this view of the law, there was enough evidence to go to the jury outside the contract, tending to show that defendants had accepted the invoice of storage of August 9, 1887, amounting to eight hundred and forty-three dollars and seventy-five cents. Defendants' reply of August 13th, to notice of having stored these goods, taken by itself, would bear plaintiffs' construction; but this letter was subject to explanation, and must be taken in connection with all the evidence in the case; and that it was not the intention of defendants to accept and pay for the storage of that invoice is clearly evinced by their letter of August 22d, in which they say: "The fifteen bags which appear in your statement, dated August 9th, please do not ship; we do not need it, as we wrote you on 18th, as we had enough on hand to run us until January 1, 1888." So, the question still comes back to the main one, What was defendants' liability on the ambiguous contract? The court below answered, none; in which answer we concur.

The assignments of error are overruled and the judgment is affirmed.

CONTRACTS—AMBIGUITIES IN—INTERPRETATION.—When the language used by parties to a contract is indefinite and ambiguous, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence, in ascertaining their understanding of its terms: Wyatt v. Larimer etc. Irr. Co., 18 Colo. 298; 36 Am. St. Rep. 280, and note.

EVIDENCE—BOOKS OF ACCOUNT.—An account book of original entry, fair on its face and shown to have been kept in the usual course of a business, is evidence even in favor of the party by whom it is kept: Borgess Inv. Co. v. Vette, 142 Mo. 560; 64 Am. St. Rep. 567, and note. See House v. Beak, 141 Ill. 290; 33 Am. St. Rep. 307, and note; monographic note to Union Bank v. Knapp, 15 Am. Dec. 191-198, discussing books of account as evidence.

WILEY'S ESTATE.

[187 PENNSYLVANIA STATE, 82]

WILLS, NUNCUPATIVE—WHAT CONSTITUTES.—To constitute a nuncupative will each requisite of the statute must be strictly complied with, and it must also be shown that there was present, not only the animus testandi, but also the intent and mind to nuncupate.

WILLS, NUNCUPATIVE—WANT OF ESSENTIALS TO.—In the absence of proof, of the testator's intent to make a will then and there, and of an explicit call upon the persons present to bear witness that such was the intended effect of the testator's declaration, the paper offered must fail as a nuncupative will.

W. H. Lex, J. G. Johnson, and C. Hager, for the appellant.

P. Boyd and G. W. Wilgus, for the appellees.

[84] MITCHELL, J. The testamentary words of the decedent as committed to writing and offered for probate are: "Everything is to go to Willie. Everything is Willie's. I want everything to go to Willie." Two of the three witnesses to whom the words were addressed testified to them at the hearing in substantially the same form. The other witness, Mrs. Forman, stated them with a context as [85] follows: "Mary, don't you or the children worry about anything. I want Willie—brother Willie, she said—to have everything. It has been put off; I intended to fix it so there would be no trouble, but it has been put off." "She realized then," continued this witness, "she wasn't able to do anything." This testimony is open to two constructions, either that the words of the decedent were an expression of the intentions she had entertained, but which she now realized it was too late to carry out, or that they were an effort to carry them out by

a nuncupative will, as she had put off until too late the making of a will in writing. Even if the latter construction was clear, however, it would be unavailing, as the words rest on the testimony of a single witness where the statute requires two. It may well be doubted, therefore, upon any of this testimony standing alone, whether the decedent herself regarded her words as an actual making of a will. And this doubt is greatly strengthened by the other testimony of one of the same witnesses, the nurse, Mrs. Rowland, that the decedent had on several previous occasions used almost the same words, coupled with the expression of an intention, as soon as she was able, to go down and "fix everything for brother Willie," as she wanted him "to have everything." "Q. She had said those same words to you a week previous, and also a month before that? A. Yes, sir. She said she was going down to settle everything; and she was getting ready to go down when she was taken suddenly ill." No doubt these were the expressions of her settled testamentary intentions, but that is not enough. All our cases agree that each requisite of the statute must be strictly proved, and the very first requisite not only of nuncupative but of all wills is the animus testandi. In Werkheiser v. Werkheiser, 6 Watts & S. 184, it is said the conversations, "it is true, go to show the intent of the decedent. But this is not enough. Everyone who undertakes to make a testamentary disposition of his property must conform to the law regulating such disposition; and if he does not take care to do so, the law cannot uphold it." And in Porter's Appeal, 10 Pa. St. 254, it was held that the decedent must intend not only to make his will, but to make it in the form that it is presented for probate; that is, there as here, to make a nuncupative will. "There ought, therefore, to be present, in order to constitute a nuncupative will, not only the animus testandi, but the mind [86] and intent to nuncupate." It was accordingly held that, although the decedent declared his intentions to a scrivener who noted them in writing at the time and in the presence of decedent, who called upon two persons present to witness that that was his will, yet it was not a valid nuncupative will because the testator had in contemplation a will to be put in writing.

In the present case, regarded in the light of our decisions on the subject, the decedent's intent to make a nuncupative will by the language proved is not sufficiently clear to sustain the will proffered.

But there is another aspect in which the appellant's case even

more manifestly fails. There must not only be the testator's intent to make a will then and there, but an explicit call on persons present to bear witness that such was the intended effect of the testator's declaration. The words of the statute are that "it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect": Act April 8, 1833, sec. 7, Pub. Laws, p. 249. The phrase "or to that effect" was intended to prevent the inference that any set form of words should be necessary, but not to diminish the requirement of a distinct and explicit request by the testator to persons present to remember and be ready to testify that the testator was thereby making his will. "The rogatio testium, the calling on persons to bear witness to the act, must also be done at the time of the nuncupation, and must be proved by two or more witnesses who were present at the time": Yarnall's Will, 4 Rawle, 46, 63; 26 Am. Dec. 115. There is an entire absence of affirmative evidence that the decedent in this case bade the persons who testified to bear witness that what she was saying was her will, or that she used any expression which, even by liberal construction, can be treated as a request "to that effect." She did desire the presence of the family, but even that is only proved by one witness, the nurse, and the purpose was not stated. It may be inferred, but the inference is not certain, and even if it were it is not enough. There must be clear proof. And very strong evidence to the contrary is furnished by the appellant himself, who, on the day of decedent's death, wrote to his nephew, the contestant, in terms implying that she had died without a will. If the beneficiary, who was present [87] when the words constituting the alleged will were spoken, did not then understand that there was any such will, it is clear that the case falls far short of the degree of proof the statute requires.

The court below also held that the will was ineffectual because not made in the extremity of the decedent's last sickness. On this point we entertain some doubt. There are mental as well as physical elements in such matters, and one of the former is the hopefulness of invalids who are unwilling to believe that death is near. Therefore, although there was sufficient time, even after the physician had warned the decedent to settle her affairs, for her to have made a will in writing, yet if she, through misplaced confidence in her ability to "pull through," as the doctor expressed it, postponed doing so, it would not necessarily follow that she might not yet make a valid nuncupative will.

But it is unnecessary to consider this point further, as the will clearly fails on the others.

Decree affirmed.

Nuncupative Wills.*

Definitions.—A nuncupative will is an oral declaration by a testator in extremis, or under circumstances considered equivalent thereto, as to the final disposition of his property, made before witnesses, and subsequently reduced to writing by another than the testator: 2 Bouvier's Law Dictionary, 528. In other words, a nuncupative will or testament is a will that is not in writing, and exists only when the testator, without any writing, declares his will orally before a sufficient number of witnesses. If a person signs a writing which he intends to be his will, the act of signing prevents the writing from being a nuncupative will: Stamper v. Hooks, 22 Ga. 603; 68 Am. Dec. 511; Prendergast v. Prendergast, 16 La. Ann. 219; 79 Am. Dec. 575.

The words spoken to constitute a nuncupative will must manifest an intention to make a will, and must be spoken in extremis: Sykes v. Sykes, 2 Stew. 364; 20 Am. Dec. 40. No words can be sustained as such a will unless the person using them has the animus testandi, and believes himself that he is making a will: Gibson v. Gibson, Walk. 364. Such wills must be made in extremis, and all of the provisions of the statute on the subject must be complied with.

The testamentary capacity and the animus testandi, at the time of the alleged nuncupation, must appear by the clearest and most indisputable evidence: Lucas v. Goff, 33 Miss. 629; Dorsey v. Sheppard, 12 Gill. & J. 192; 37 Am. Dec. 77. Such testaments must bear upon their faces the evidence that all of the formalities required by law have been complied with: Weick v. Henne, 41 La. Ann. 1153. Nuncupative wills are tolerated, but not favored, and their admission to probate must be preceded by proof of strict compliance with the statute in every particular: Mitchell v. Vickers, 20 Tex. 377; Yarnall's Will, 4 Rawle, 46; 26 Am. Dec. 115; Andrews v. Andrews, 48 Miss. 220.

The Testamentary Capacity of the Maker and the animus testandi must be shown by clear and indisputable evidence. The instrument must also be clearly shown to contain the true substance and import of the alleged nuncupation.

A nuncupative will must also be made in extremis, and when the testator has neither time nor opportunity to make a written will: Yarnall's Will, 4 Rawle, 46; 26 Am. Dec. 115; Morgan v. Stevens, 78 Ill. 287; Prince v. Hazleton, 20 Johns. 502; 11 Am. Dec. 307; Winn v. Bob, 3 Leigh, 140; 23 Am. Dec. 258; Dorsey v. Sheppard, 12 Gill. & J. 192; 37 Am. Dec. 77; Scaife v. Emmons, 84 Ga. 619; 20 Am. St. Rep. 383; Boyer v. Frick, 4 Watts & S. 357; Bellamy v. Peeler, 96 Ga. 467. Thus in Ellington v. Dillard, 42 Ga. 361, it was held that when a written instrument was offered for probate as the

*REFERENCE TO MONOGRAPHIC NOTES.

Nuncupative wills: 20 Am. Dec. 44-48; 81 Am. Dec. 230, 231.

nuncupative will of a testatrix, dictated and signed by her thirty days prior to her death, but during her last illness, it was not entitled to probate, as it did not appear that the testatrix was in extremis at the time of her dictating and signing such writing, or that she was prevented by sudden surprise or providential cause from executing a written will. Or, if a decedent, after making the declarations set up as his will, was able to come downstairs to receive and converse with visitors, and to walk on the street, and died the next day from a rupture of the lungs, he was not in such extremity of a last sickness as authorized a nuncupative will: Werkheiser v. Werkheiser, 6 Watts & S. 184. And a nuncupative will executed by a testator in his last sickness, and three days before his death, while he had time, opportunity, and ability to have executed a formal written will, and by which he gave nearly his entire property to his widow, to the exclusion of his children, is illegal and void: Scaife v. Emmons, 84 Ga. 619; 20 Am. St. Rep. 383. To the same effect is Morgan v. Stevens, 78 Ill. 287.

The Statutory "Last Sickness" in which the words must be spoken in order to constitute them a nuncupative will does not cover a lingering illness which does not incapacitate: Sadler v. Sadler, 60 Miss. 251. Thus an illness which lasted for several months, during which the afflicted persons had ample time and opportunity, after information that recovery was impossible, to make a written will and after efforts to do so, is not a "last sickness" authorizing nuncupative wills: Donald v. Unger, 75 Miss. 294. And if one has suffered for a long time with pulmonary consumption, and lives for nine days after the alleged nuncupation, it cannot be admitted to probate as his will: Yarnall's Will, 4 Rawle, 46; 26 Am. Dec. 115. Especially if the alleged testator retained capacity up to the time of his death sufficient to have enabled him to make a written will: Carroll v. Bonham, 42 N. J. Eq. 625. An oral disposition of his property on the day before his death, by one who had long been an invalid from consumption and had been informed that his recovery was hopeless, and who died in the full possession of his faculties, cannot be recognized in law as a valid nuncupative will: O'Neill v. Smith, 33 Md. 569.

Attempts to Make Written Wills.—If a testator, being in extremis, requests another person to write his will, and, after it is written, the testator attempts to sign it, but, being unable to do so, requests the writer to sign for him, but swoons before it can be done, and then dies without further effort to execute the will, the writing may be held a valid nuncupative will, if the necessary witnesses were present and heard the bequests: Phoebe v. Boggess, 1 Gratt. 129; 42 Am. Dec. 543.

In Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290, it was held that if one in his last sickness, without hope of recovery, executed his nuncupative will as required by the statute, it would not be held invalid merely because he had time and opportunity to reduce it to writing. The same rule is maintained in Nolan v. Gardner, 7 Heisk. 215; but these cases, as we have heretofore shown, are opposed to the great weight of authority. The true rule is, perhaps, nowhere

better stated than in Bellamy v. Peeler, 96 Ga. 467, 468, where Mr. Justice Lumpkin, in delivering the opinion of the court, said that: "In testing the validity of an alleged nuncupative will, it is impossible, in the nature of things, to lay down a fixed and unvarying rule as to what length of time may elapse between the dictation of the will and the death of the testator. In such case, the test to be applied is not one of mere time alone. For example, a person conscious of approaching death might dictate an oral will, and within a few minutes after doing so become insensible and remain so for days or even weeks before death ensued, and finally die without having returned to consciousness. In a case like this, the will would undoubtedly be valid. On the other hand, a person in a dying condition might go through the form of making a nuncupative will and live only a few hours thereafter, and yet the will would not be valid if it also appeared that a scrivener was present ready to reduce the will to writing, and that there was ample time for so doing, nothing to prevent it, and still the testator deliberately declined to have this done": Bellamy v. Peeler, 96 Ga. 468.

Verbal Instructions and Directions for Drawing a Written Will do not constitute a nuncupative will, though spoken in the presence of witnesses requested to bear witness thereto, and reduced to writing: Dockum v. Robinson, 26 N. H. 372; Donald v. Unger, 75 Miss. 294. And a document drawn in pursuance of instructions of an intending testator, for the purpose of being executed as a written will, but unexecuted solely because death unexpectedly intervened, cannot be established as a nuncupative will: Will of Male, 49 N. J. Eq. 266. It has been held, however, that an imperfect written will may have effect as a nuncupative will if its noncompletion in legal form results from the act of God, or from any cause other than an actual intention to abandon it or to postpone its consummation: Offutt v. Offutt, 3 B. Mon. 162; 38 Am. Dec. 183; Phoebe v. Boggess, 1 Gratt. 129; 42 Am. Dec. 543.

Attacking and Impeaching.—It is competent to prove that the testamentary words reduced to writing and probated are not substantially the words spoken by the alleged testator, and when this fact is established the invalidity of the will is proven: Bolles v. Harris, 34 Ohio St. 38.

A nuncupulative will, to be valid anywhere, must be made according to the local law of the testator's domicile at the time of his death, and unless proved according to such law, it cannot be admitted to probate in another state: Barnes v. Brashear, 2 B. Mon. 380; Abston v. Abston, 15 La. Ann. 137. Such a will, if made by interrogatories, requires stricter proof of spontaneity and volition than would be required in an ordinary case: Dorsey v. Sheppard, 12 Gill. & J. 192; 37 Am. Dec. 77; and more stringent evidence is always required to prove a nuncupative than a written will: Smith v. Thurman, 2 Heisk. 110. If a testator, by nuncupative will, bequeaths his personalty to a certain person and dies seised of realty sufficient to pay his debts without disposing of such realty by will, the legatee takes such personalty discharged from the payment of

the debts of the testator. And in any case where there is such a devise of personalty, and the testator leaves realty undevised, the creditors of the estate must first resort to the realty: McCullom v. Chidester, 63 Ill. 477. If the statute provides for the time within which a nuncupative will must be established after the death of the testator, it must, to be operative, be proved within that time: Williams v. Pope, Wright, 406.

Originally, Real Estate could not be Devised by Nuncupative Will, and though this rule generally prevails at the present day, it is purely a matter of statutory regulation. In the following jurisdictions it has been held under statutes then in force that such wills were not effective to pass the title to land: Palmer v. Palmer, 2 Dana, 390; McLeod v. Dell, 9 Fla. 451; Pierce v. Pierce, 46 Ind. 86; Page v. Page, 2 Rob. (Va.) 424; Williams v. Pope, Wright, 406; Smithdeal v. Smith, 64 N. C. 52. Under the Georgia statute, land may be devised by nuncupative will, and it may also under the present Ohio statute: Gillis v. Weller, 10 Ohio, 463. Under the Iowa statute a verbal will disposing of personalty exceeding in value three hundred dollars is invalid: Stricker v. Oldenburgh, 39 Iowa, 653.

In the State of Louisiana, the law in relation to nuncupative wills is peculiar to that state alone. Such wills may be there made, either by public, or by private act, and the statute provides that when such a will is made by public act, it must be received by a notary in the presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place. This testament must be dictated by the testator, and written by the notary as it is dictated. It must be read to the testator in the presence of the witnesses. All of the formalities required by this statute must be observed at one time, without interruption, or turning aside to other acts. Otherwise, the testament is void. Such wills are full proof in themselves and they must bear upon their faces evidence that all formalities required by the statute have been complied with. An omission of any one of such formalities cannot be supplied by evidence dehors the testament: Weick v. Henne, 41 La. Ann. 1153; Succession of Vollmer, 40 La. Ann. 593; King v. Vairin, 28 La. Ann. 452; Succession of Dorries, 37 La. Ann. 833. Such a will executed before three witnesses is void, if one of them did not understand the language in which the will was written sufficiently to comprehend what was said: Breaux v. Gallusseaux, 14 La. Ann. 233; 74 Am. Dec. 430. The notary must expressly mention that the will was dictated by the testator, written by the notary as dictated, and the reading of the will to the testator in the presence of the witnesses. If the testator is uneducated and dictates his will in an idiom peculiar to the uneducated, the will cannot be avoided simply because the notary writes it in polite language, provided the exact meaning of the testator is preserved: Succession of Saux, 46 La. Ann. 1423; Hennessey v. Woulfe, 49 La. Ann. 1376. If the certificate to the will made by the notary states his request to the testatrix to sign, and her answer that she cannot because she does not

know how, it imports that such declaration was made to the notary and is sufficient: Hennessey v. Woulfe, 49 La. Ann. 1376. A nuncupative testament by private act or signature may be written by the testator himself or by any other person from his dictation, or even by one of the witnesses, in the presence of five witnesses residing in the place where the will is executed, or of seven witnesses residing out of such place, or it is sufficient if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament or caused it to be written out of their presence, declaring to them that the paper contains his will: King v. Vairin, 28 La. Ann. 452; Wood v. Roane, 35 La. Ann. 865. But they must declare that they saw the testator sign the paper before signing themselves: Pfarr v. Belmont, 39 La. Ann. 294. If one of the required witnesses to a will by private act does not understand the language in which the testator expresses himself, the will is invalid, although what was said by the testator during such dictation was translated to the witness: Succession of Dauterive, 39 La. Ann. 1092.

Witnesses.—The presence of at least two disinterested persons as witnesses at the making of a nuncupative will is generally necessary to its validity: Haus v. Palmer, 21 Pa. St. 296; Wester v. Wester, 5 Jones, 95; Tally v. Butterworth, 10 Yerg. 501; Vrooman v. Powers, 47 Ohio State, 191. In Portwood v. Hunter, 6 B. Mon. 538, it was held that it was not indispensable that the publication of the will should take place in the presence of two witnesses at the same time, although the statute required two witnesses to such will. The true rule seems to be that the witnesses must both be present and hear the testator make the same declarations at the same time: Tally v. Butterworth, 10 Yerg. 501; Arnett v. Arnett, 27 Ill. 247; 81 Am. Dec. 227; Yarnall's Will, 4 Rawle, 46; 26 Am. Dec. 115.

The testimony of the witnesses must agree, at least substantially, as to the words spoken and the disposition of his property made by the testator: Mitchell v. Vickers, 20 Tex. 377; and if the two witnesses required do not concur as to all of the bequests, the will can be established only so far as they do concur: Portwood v. Hunter, 6 B. Mon. 538.

Testamentary Intent must Exist.—It is essential to the validity of a nuncupative will that it should appear that the deceased, at the time that he spoke the alleged testamentary words, had a present intention to make his will, and spoke the words with such intent, and especially that he should distinctly indicate that intention by calling upon persons present to take notice or bear testimony that such was his will, or by saying or doing something, tantamount in substance, indicating plainly and clearly that the words spoken were designed to be testamentary, for no such will can be good and valid unless it is proved that the testator at the time of pronouncing the testamentary words, did bid the persons present, or some of them, bear witness that such was his will or words to that effect: Sampson v. Browning, 22 Ga. 293; Andrews v. Andrews, 48 Miss. 220; Broach v. Sing, 57 Miss. 115; Parkison v. Parkison,

12 Smedes & M. 672; Winn. v. Bob, 3 Leigh, 140; 23 Am. Dec. 258; Baker v. Dodson, 4 Humph. 342; 40 Am. Dec. 650; Biddle v. Biddle, 36 Md. 630; Brown v. Brown, 2 Murph. 350; In re Will of Hebden, 20 N. J. Eq. 473; Will of Male, 49 N. J. Eq. 266; Morgan v. Stevens, 78 Ill. 287; Estate of Askins, 20 Dist. Col. Rep. 12; Bundrick v. Haygood, 106 N. C. 468; Babineau v. Le Blanc, 14 La. Ann. 739; Hare v. Bryant, 1 Sneed, 270; Yarnall's Will, 4 Rawle, 46; 26 Am. Dec. 115; Arnett v. Arnett, 27 Ill. 247; 81 Am. Dec. 227; Taylor's Appeal, 47 Pa. St. 31; Dockum v. Robinson, 26 N. H. 372.

The Request to the Witnesses.—It is not absolutely essential to the validity of the will that the testator should use the exact words of the statute in requesting the persons present to bear witness that such is his will. It is sufficient if such desire is clearly and unequivocally manifested by the testator, but it is indispensable that he should expressly desire those present to bear witness that the words then expressed were his last will, or that he should say or do something equivalent to an express request. But any form of expression, however imperfectly uttered, so that it clearly conveys to the minds of those to whom it is addressed the idea that he desires them or some of them to bear witness to the disposition that he is then making of his property is sufficient: Weir v. Chidester, 63 Ill. 453; Estate of Grossman, 75 Ill. App. 224; Kelly v. Kelly, 9 B. Mon. 553. If the other essential facts exist, it is not necessary that the persons called upon by the testator to witness his testamentary disposition and declaration should be designated by him by name: Long v. Foust, 109 N. C. 114. Thus, where the testator had fully stated the disposition to be made of his property, addressed those about him, and said, "You all know now what I want done, and that is all I have got to say," it was held that such expression was in fact a calling upon those present to remember and bear witness to the disposition made by the testator of his property, and a sufficient attestation of the will: Bradford v. Clower, 60 Ill. App. 55. But the statute is not satisfied in this respect, and the will is invalid when the testator requests one person present "to witness what he said," and another, to "come back and pay attention to what he said": Dawson's Appeal, 23 Wis. 69.

Soldiers and Sailors.—Soldiers in actual military service and mariners at sea are always permitted to dispose of their personal property by nuncupative wills. Such nuncupations need not be made during a last sickness in order to be valid. No particular manner is prescribed for making such a testament, and no particular witnesses or number of witnesses are required to verify the act. "And all the court demands is to be satisfied by sufficient evidence as to the substance of the last testamentary request or declaration of the deceased. This ascertained, the law holds it sacred, and carries it into effect with as much favor and regard as would be paid to the most formal instrument executed with every legal formality": Ex parte Thompson, 4 Brad. 154. "Soldiers in actual military service may make nuncupative wills and dispose of their

goods, wages, and other personal chattels, without those forms, solemnity, and expense which the law requires in other cases. Strict formalities, both in the execution and construction of nuncupative wills of soldiers, is dispensed with, and although they should neither call the legal number of witnesses, nor observe any other solemnity, yet their testament is held good if they were in actual service": Hubbard v. Hubbard, 8 N. Y. 196-200.

To enjoy the benefit of this immunity, the soldier or sailor must be in actual service, the sailor at sea and the soldier in an expedition; but the privilege extends to all ranks and grades: Ex parte Thompson, 4 Brad. 154. Thus an officer in the Union army, after it had commenced to move on Richmond, Virginia, during the Civil War in 1864, wrote and sent a letter to his sister informing her that if he was killed or did not return, he wanted her to have his property, and he was subsequently killed in an engagement with the enemy. The court decided that the letter was a valid will by a soldier, and should be admitted to probate as such: Botsford v. Krake, 1 Abb. Pr., N. S., 112.

The terms, "actual service" and "engaged in an expedition," are synonymous, and the term "expedition" is not to be confined to that movement of the troops which immediately precedes the actual conflict and shock of battle. Thus, where an enlisted soldier, having marched into the enemy's country, from which he never returned, and encamped among hostile people, and acting in conjunction with soldiers confronted by the enemy, although in winter quarters, and not occupied with any present movement of the troops, but on some service detached from his own regiment, is a soldier in actual service, so as make valid his nuncupative will directing the disposal of his personal property: Leathers v. Greenacre, 53 Me. 562.

It is not necessary, in order to make a valid soldier's will, that the soldier should be in extremis. When he is in the enemy's country, or in his own state or country, performing military service, whether in camp, compaign, or in battle, such service is "actual military service" within the meaning of the statute: Van Duezer v. Estate of Gordon, 39 Vt. 111. A soldier who falls sick while moving with his company against the enemy, and is confined in a hospital, is in "actual military service," and if, while so confined, he declares to his comrades that he desires a certain aunt and uncle named to have enough of his property to repay them for their trouble and expense in caring for him during a former illness, and that he wanted his brother to have the remainder of his personal property, and requests one comrade who is introduced to prove the will, to write to a person named as to the disposition which the testator desired to be made of his property, such declarations and request are sufficient to make a valid will by a soldier: Gould v. Safford, 39 Vt. 498. If a soldier in actual service, suffering from a disease of which he subsequently dies, upon being advised of his condition, and asked if he wished to make any disposition of his property, replied in the presence of two witnesses to tell his friends that he wished his sister to have a designated

slave, such disposition of the slave is a valid nuncupative will, especially if such request was put in writing in a letter to the husband of such sister, on the same day, that it was made: Gwin v. Wright, 8 Humph. 639.

A volunteer in the United States army who has not been accepted and mustered into the service cannot make a nuncupative will as a soldier. He is not in actual military service: Pierce v. Pierce, 46 Ind. 86. A soldier while at home on furlough cannot make such a will as a soldier, for the same reason: Smith's Will, 6 Phila. 104.

A valid nuncupative will by a seaman must be made while he is actually at sea. But a cook, while on board a steamship lying in a foreign port, is to be considered as a mariner at sea, so as to enable him to make a nuncupative will or parol testament personal in its nature: Ex parte Thompson, 4 Brad. 154. A valid nuncupative will may be made by the master of a coasting vessel, while on her voyage, though then lying at anchor, in an arm of the sea, where the tide ebbs and flows. In such case, it is only necessary that the testator state orally what disposition he wishes made of his personalty, and it is not requisite that he should request those present to witness that such is his will: Hubbard v. Hubbard, 12 Barb. 148; 8 N. Y. 196. A master mariner by profession, who is merely a passenger on board a steamer at the time he undertakes to make a nuncupative will, is not a mariner or seaman at sea, so as to make his nuncupation valid as a will. The meaning of "mariner or seaman at sea," as used in relation to verbal testaments, means a seaman or mariner "employed as such at sea": Warren v. Harding, 2 R. I. 133.

JUNIATA LIMESTONE COMPANY *v.* FAGLEY.

[187 PENNSYLVANIA STATE, 193.]

CONSTITUTIONAL LAW—TAXATION OF ALIENS.—A statute imposing a tax on the employers of foreign born, unnaturalized male persons, and regulating their employment, is unconstitutional as being in conflict with the fourteenth amendment of the federal constitution, and with a provision in a state constitution providing that all taxes shall be uniform upon the same class of subjects.

Bill in equity to restrain the collection of a tax imposed by "an act regulating the employment of foreign born, unnaturalized male persons over twenty-one years of age, and imposing a tax on the employers of such persons." Judgment for the plaintiffs, and defendants appealed.

W. S. Hammond and J. H. Smith, county solicitor, for the appellants.

Stevens, Owens & Pascoe, for the appellee.

[196] STERRETT, C. J. This appeal is from the decree of the court below wherein the act of June 15, 1897 (Pub. Laws, p. 166), entitled, "An act regulating the employment of foreign born, unnaturalized male persons," et cetera, was adjudged unconstitutional, because it offends against the fourteenth amendment to the constitution of the United States, and also section 1 of article 9 of our own constitution. If the court was right in declaring the act unconstitutional on either ground, it necessarily follows that there was no error in awarding the injunction against the defendants, and the decree should be affirmed.

The act in question clearly belongs to a vicious species of class legislation which too often finds its way into our statute books, and we have no doubt as to its unconstitutionality on both grounds indicated by the learned president of the court below. It has already been adjudged void by the circuit court of the United States of the western district of Pennsylvania.

In Fraser v. McConway etc. Co., 6 Pa. Dist. Rep. 555, the learned circuit judge, after citing authorities directly in point, said: "The tax is of an unusual character, and is directed against and confined to a particular class of persons. Evidently, the act is intended to hinder the employment of foreign born, unnaturalized persons over twenty-one years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations obstacles to which others in like circumstances are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. The equal protection of the laws declared by the fourteenth amendment to the constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances": Railroad Tax Cases, 13 Fed. Rep. 722, 733.

In that case the court said: "Unequal exactions in every form, or under any pretense, are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive [197] burdens are usually laid. It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here": Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150, 165. In the last-cited case, Mr. Justice Brewer said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the Fourteenth

Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

The clear and convincing opinion of Judge Acheson, from which we have thus largely quoted, conclusively shows that the act of 1897, supra, cannot stand the test of the Fourteenth Amendment.

We think it is equally clear that the act offends against our own constitutional mandate: "All taxes shall be uniform upon the same class of subjects," et cetera. This sufficiently appears from the authorities above cited. It is very apparent from the act itself that the pretended classification of the subjects of taxation is arbitrary and illegal; but, in addition to that, it directly and intentionally discriminates against members of the same class, and creates an inequality among them.

Further comment is unnecessary. We are clearly of opinion that the conclusion reached by the court below is correct; and the decree is accordingly affirmed, and appeal dismissed at appellants' costs.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT TO FEDERAL CONSTITUTION.—The fourteenth amendment to the constitution of the United States is thoroughly considered with relation to special privileges, burdens, and restrictions in the monographic note to State v. Goodwill, 25 Am. St. Rep. 870-890. Compare with principal case, Ex parte Kuback, 85 Cal. 274; 20 Am. St. Rep. 226, where a municipal ordinance imposing a penalty upon the employment of Chinese was adjudged invalid.

DAVIS *v.* MONROE.

[137 PENNSYLVANIA STATE, 212.]

DEEDS—REGISTRATION AS NOTICE.—The record of a deed is notice only to those who are bound to search for it, including parties subsequently dealing with the land or concerned with its title, but antecedent rights are not generally affected by registration and the record is not notice to the grantor in the deed.

DEEDS—LAND INCLUDED BY FRAUD—LIMITATIONS.—If land not intended to be conveyed is included in a deed through the active fraud of the grantee and without the knowledge of the grantor, who continues in possession, the statute of limitations does not begin to run against him until he has knowledge of the fraud or such notice as puts him on inquiry.

DEEDS—FRAUDULENT ACKNOWLEDGMENT—COMPETENCY OF OFFICER AS WITNESS.—The fact that a justice of the peace, knowing of a fraud, took an acknowledgment of a deed by which the fraud was to be carried out, and said nothing at the

time to the parties defrauded, is a circumstance that may affect his credibility with the jury, but does not make him an incompetent witness in a contest between the original parties.

Ejectment for a tract of land known as the "flat iron tract." Defendant claimed that it had been fraudulently included in a deed with other land which he and his wife had executed. Judgment for plaintiffs, and the defendant appealed.

C. H. Dornan and H. H. Rockwell, for the appellant.

W. I. Lewis, for the appellees.

215 MITCHELL, J. The offer of defendant at the trial was not to show that he had acquired title by adverse possession as against his own deed to Cobb. That would have required proof of acts clearly hostile to Cobb's title, so as to convey notice to the latter. No such acts are claimed here. But the offer was to show that as to the "flat-iron tract," although it was included in the deed, yet by reason of the fraud the title never passed to Cobb, but remained in the defendant as it had been before. After the deed the appellant, grantor, remained in possession of the land. It is conceded that as to so much as was properly included in the deed, he was thereafter in possession as trustee for his 216 grantee Cobb, and cannot now dispute the latter's title. But as to any land not intended to be granted, and only included in the deed through fraud, defendant continued to hold by his former title, and the statute of limitations did not run against him until discovery or such notice as put him upon inquiry.

The learned judge below was of opinion that the recording of the deed was constructive notice to appellant of the extent of Cobb's claim under it, and that after twenty-one years appellant could not be heard to dispute his grant. In this he gave too broad an effect to the notice implied by the recording acts. The record is notice only to those who are bound to search for it, including parties subsequently dealing with the land or concerned with its title: Maul v. Rider, 59 Pa. St. 167. But, in general, antecedent rights are not affected. The recording of a deed is the act of the grantee and in his interest. He may or may not put it on record for years or at all. The grantor is under no obligation to see to its recording or to examine the terms thereof. Consequently it is no notice to him.

Taking the facts to be as shown in the offer, which for present purposes we are bound to do, the "flat-iron tract" was not intended to be conveyed, and was included in the deed only by

an active fraud. Appellant, therefore, never parted with his title to that tract, but remained in possession in his own right as before. If this ejectment had been brought the next day after the delivery of the deed, he could have made this defense, and, as nothing has been shown to indicate knowledge of the fraud or notice to put him upon inquiry, he may make it now. The offer, therefore, should have been admitted.

It is objected further by the appellees that, on public policy, the justice of the peace cannot be permitted now to impeach his certificate of acknowledgment. How far such a rule may be invoked for the protection of subsequent purchasers or parties dealing with the land on the credit of his official act we are not now called upon to consider, but it cannot be applied between the original parties or their privies. That a justice of the peace, knowing of a fraud, took an acknowledgment of a deed by which the fraud was to be carried out, and said nothing at the time to the parties defrauded, is a circumstance that may affect his credibility with the jury, but does not make him an incompetent witness in a contest between the original parties.

Judgment reversed and venire de novo awarded.

DEEDS—RECORDING OF, AS NOTICE.—Recording a deed imparts notice to all persons who subsequently become interested in the title either as purchasers or mortgagees: Davis v. Ownsby, 14 Mo. 170; 55 Am. Dec. 105. Such record is not notice to persons already having title: Holly v. Hawley, 39 Vt. 525; 94 Am. Dec. 350. It is constructive notice to those only who claim through or under the grantor by whom the deed was executed: Blake v. Graham, 6 Ohio St. 580; 67 Am. Dec. 360. See Corey v. Smalley, 106 Mich. 257; 58 Am. St. Rep. 474.

LIMITATIONS OF ACTIONS—WHEN STATUTE BEGINS TO RUN—FRAUD.—In cases of fraud, the bar of the statute of limitations begins to run only from the date of the discovery of the fraud: Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261; 38 Am. St. Rep. 656, and note; or from the time when it ought to have been discovered in the exercise of proper diligence and inquiry: Chicago etc. Ry. Co. v. Titterington, 84 Tex. 218; 31 Am. St. Rep. 39, and note; Gillett v. Wiley, 126 Ill. 310; 9 Am. St. Rep. 587.

WARREN v. FREEMAN.

[137 PENNSYLVANIA STATE, 455.]

MECHANICS' LIENS—BUILDING WHETHER NEW OR ONLY ALTERED.—Under a statute giving a lien for work done or material furnished in erecting a building, the lien cannot be enforced for alteration or repairs, but if the structure of the building is so completely changed that in common parlance it may prop-

erly be called a new building or a rebuilding, it comes within the statute. Newness of structure in the main mass of the building, an entire change of external appearance which denotes a different building from that which gave place to it, though some parts of the old may have entered into it, is what constitutes a new building, as distinguished from one altered or repaired.

MECHANICS' LIENS—QUESTION OF LAW.—Whether a structure is a new one, as distinguished from an old one merely repaired or altered, so as to confer a right to a mechanic's lien is a question for the trial court, when the evidence descriptive of the changes made in the old building is not contradicted.

T. H. Speakman and A. J. H. Frank, for the appellant.

G. P. Rich and H. C. Boyer, for the appellees.

458 McCOLLUM, J. The contention of the plaintiff is, that he has, by virtue of his claim filed on June 3, 1896, under the act of June 16, 1836, a valid lien on the building described therein. It is conceded that if the alterations and repairs upon it constitute a new structure he is entitled to judgment for the amount of his claim. The defendants, however, contend that his claim is not enforceable against the building because it represents work done and materials used in altering and repairing an old building, and not in the erection and construction of a new one. The claims grounded upon the erection and construction of a building must be filed under the act of 1836, and the claims based on alterations and repairs must be filed under the act of May 18, 1887, and in strict conformity with its provisions. In the case in hand, the claim is filed against a building described as a "three-story brick building, consisting of front building of Pompeian brick, 459 fronting Oxford street thirty-six feet six inches, and extending in depth twelve feet; main building three-story brick, thirty-six feet six inches in width and about thirty-six feet in depth, and gymnasium building two-story brick, thirty feet in width, and about sixty feet in depth." The building described in the plaintiff's claim is an enlargement of an old building which consisted of the main building referred to therein, and a three-story building in the rear of it, twenty feet in width and thirty feet in depth. The changes made in the old building, which are claimed to have converted it into a new structure, were as follows: The second and third stories of the back building were taken down and the back wall of it was removed; the location of the east wall of it was not changed, but the west wall, in accordance with the plan devised for the enlargement of the building, was located on the west line of the lot. The building as enlarged is twenty feet high, of the width

of thirty feet, and of the depth of sixty feet. The only change in the main building, aside from some alterations in the interior, is the extension of it to the building line on Oxford street.

It is so well settled that a lien will not lie under the act of 1836 for alterations and repairs that a discussion of or extended reference to the cases in which the subject is fully considered is unnecessary. It has been held, however, that where the structure of a building is so completely changed that in common parlance it may properly be called a new building or a rebuilding it comes within the act: Armstrong v. Ware, 20 Pa. St. 519; Patterson v. Frazier, 123 Pa. St. 419. "Newness of structure in the main mass of the building—that entire change of external appearance which denotes a different building from that which gave place to it, though some parts of the old may have entered into it—is that which constitutes a new building, as distinguished from one altered": Miller v. Hershey, 59 Pa. St. 64. In Landis' Appeal, 10 Pa. St. 379, it was held that where the front wall of a house was taken down and a new wall erected on a different foundation, and the inside of the house, excepting the floors, was altered and renewed, and a new roof was put on, and a new back building was erected, the claims for work and materials were not liens within the act.

In the case at bar, the roof and the side and back walls of the main building remain unchanged, and the alterations made in
460 the interior of it, together with the front extension of twelve feet, are insufficient to give to it the appearance of a new building. The same may be said of the enlargement of the back building. The evidence descriptive of the changes made in the old building, being uncontradicted, casts upon the trial judge the duty of determining whether the structure against which the claim was filed was an altered or a new one: Armstrong v. Ware, 20 Pa. St. 519; Norris' Appeal, 30 Pa. St. 122; Patterson v. Frazier, 123 Pa. St. 419. He held that the building as altered and enlarged was not a new structure, and that the claim filed against it was not a lien upon it within the act of 1836. He accordingly directed the jury to find a verdict for the defendants. In his conclusion respecting the building and in his direction to the jury we concur. The plaintiff was not entitled to a lien on the building under the act of 1836, and he made no effort to obtain one under the statutes which authorize liens for alterations, additions, and repairs.

Judgment affirmed.

MECHANIC'S LIEN—BUILDING—WHAT IS, WITHIN STATUTE.—If a structure is of a substantial and permanent character, and may, in any reasonable sense, be known as a building, it may be encumbered by a mechanic's lien: Wheeler v. Pierce, 167 Pa. St. 416; 46 Am. St. Rep. 679; La Crosse etc. R. R. Co. v. Vanderpool, 11 Wis. 119; 78 Am. Dec. 691, and monographic note. See note to Paulsen v. Manske, 9 Am. St. Rep. 537-539.

ZEHNER *v.* LEHIGH COAL AND NAVIGATION CO.

[187 PENNSYLVANIA STATE, 487.]

EVIDENCE—DEPOSITIONS.—A deposition taken in shorthand must be fully written out in longhand, read by or to the witness and signed by him, before it can be received as evidence.

ARBITRATION—REVOCATION OF AGREEMENT.—If an agreement to arbitrate partakes of the nature of a contract whereby important rights are gained and lost reciprocally, and the submission is the moving consideration to these acts, the agreement is irrevocable.

ARBITRATION—REVOCATION OF AGREEMENT—CONSIDERATION.—If, by an agreement to arbitrate, the title to land, together with water privileges, is admitted to be in one of the parties, and damages are admitted to be due, and the agreement simply provides for their assessment, it is founded on a valuable consideration, and cannot be revoked by the other party.

ARBITRATION—REVOCATION.—An agreement to arbitrate, when made a rule of court, is irrevocable.

ARBITRATION—AGREEMENT CONCERNING PRACTICE.—An agreement to arbitrate made in an action then pending must be treated as under a rule of court, and, it is not necessary to stipulate to that effect in the agreement.

D. W. Kaercher and W. F. Shepherd, for the appellant.

S. Dickson, F. G. Farquhar, and J. W. Ryon, for the appellee.

489 STERRETT, C. J. This action of trespass was brought by the appellants' intestate in December, 1889. Nine days thereafter service of the writ was accepted, and nothing further was done until the following agreement was signed by counsel for the respective parties:

"And now, August 26, 1896, we, the said David Zehner and Lehigh Coal and Navigation Company, under the provisions of the act of June 16, 1836, by reason of the damage done by the deposit of coal dirt in the Little Schuykill river by the defendant above named, thereby depriving said plaintiff (the said plaintiff being seised and possessed of a tract of land bordering on the Little Schuylkill river, on which is erected a sawmill and gristmill) of the benefit and advantage of the water of the said river, he having the right to have and enjoy the same for

the operations of the said sawmill and gristmill, do hereby agree to submit the question of damage done to the said property, sawmill, and gristmill of the plaintiff by the coal dirt deposited as aforesaid by the said defendant, to voluntary arbitration, each party to choose one arbitrator, and the two so chosen to choose the third, and furthermore we agree that our submission to such award shall be made a rule of and in said court, and hereby respectively bind ourselves to submit and be finally concluded by the award of said arbitrators or a majority of them; the said plaintiff hereby names Edwin Schlichter as his arbitrator, the defendant hereby names Daniel Shepp as its arbitrator, and the two so chosen having named the third arbitrator, the meeting is to be held on the premises of the said plaintiff at a time to be fixed by said arbitrators, of which time ten days' notice is to be given to counsel for the respective parties."

490 Under this reference the arbitrators heard the evidence on both sides and arguments of counsel, but before their award was filed defendant gave notice of revocation of the submission, June 11, 1897. Three days thereafter the arbitrators filed their award, signed by a majority of their number, finding in favor of the plaintiff the sum of eighteen thousand dollars, and judgment was entered thereon. The defendant moved to strike off the submission, award, and judgment.

On motion, ex parte depositions of the arbitrators were taken by the plaintiff to show that, at the time the notice of revocation was served, the award had been substantially agreed upon. As at first filed these depositions contained a certificate to the effect that "the foregoing is a true and correct transcript of my stenographic notes taken at the time and place set out in the captions." Subsequently, the court permitted an affidavit by the officer to be filed, in which it was asserted "that the said depositions were taken by deponent in his official capacity as a 'notary public,' and that the parties whose depositions were taken had been first duly sworn by said deponent on a certain day, et cetera, but no jurat was appended to the depositions, nor were they signed by the witnesses."

On the hearing of the rule to strike off, et cetera, the court declined to receive or consider the depositions, but afterward struck off the submission, award, and judgment, on the ground that they were invalidated by the revocation. These two acts of the court are the subjects of complaint in the specifications of error.

In the manifestly defective form in which the depositions

were presented the learned court was clearly right in rejecting them. It ought to be obvious to any one that depositions taken by a stenographer in shorthand must be fully written out in longhand, read by or to the witness, assented to and signed by him. These requirements or their full equivalents are essential and cannot be dispensed with. The so-called depositions offered in this case were wanting in nearly all of these essential particulars. Such a practice is exceedingly vicious and dangerous, and cannot be too severely condemned. It is true the depositions, so-called, were written out in longhand, but until they were scrutinized and assented to by the witnesses there could be no assurance that they were correct.

491 The other question is not wholly free from difficulty. The authorities on the subject are not entirely harmonious, and must be carefully read. Starting with the proposition, grounded on general principles, that a submission, like any other naked authority, is countermandable before execution, although expressed to be irrevocable, the appellants contend for at least two exception to the general rule: 1. If the submission is upon a consideration it is no longer revocable; and 2. If the submission be made a rule of court it is irrevocable.

The first cannot properly be called an exception to the rule applicable to a naked authority, because, as soon as a consideration passes, the agreement is no longer nudum pactum. The appellee assents to this, but claims that the submission in question is without consideration, and, therefore, a naked authority, and revocable at any time before it is executed.

In Paist v. Caldwell, 75 Pa. St. 166, it is said: "Where the agreement partakes of the nature of a contract whereby important rights are gained and lost reciprocally, and the submission is the moving consideration of these acts, a different rule prevails. Such agreements are compromises, and should be faithfully adhered to, unless there has been fraud or corruption or gross misbehavior by the referees": See, also, McKenna v. Lyle, 155 Pa. St. 599; 35 Am. St. Rep. 910. The case at bar appears to belong to this class. The defendant, by the agreement, has made concessions which are of value to the plaintiff. In the first place, title to the land is admitted to be in the plaintiff, together with the water privileges. In the next place, damages are admitted to be due and owing, and the agreement provides simply for their assessment. These are considerations moving from defendant to plaintiff. They are compromises to the extent to which they concede what must otherwise be

proved. Their value cannot well be estimated, owing to the exigencies that may arise on a trial. They are plainly sufficient to constitute a valuable consideration. The same may be said of the delay incident to a reference. It is not apparent how the value of this concession is minimized, as suggested in appellee's argument, by the fact that there was great delay prior to the reference. The very opposite conclusion should be drawn. In Williams v. Tracy, 95 Pa. St. 308, 310, Mr. Justice Paxson said: "Having obtained the benefit of the delay, it did not lie in the mouth of the [492] defendant to repudiate the act of his attorney and deny his authority. He received a consideration for the submission which made it irrevocable." To the same effect is McGheehen v. Duffield, 5 Pa. St. 497. Another reason why the submission in question should be held to be irrevocable is that it was made a rule of court. In 2 American and English Encyclopedia of Law, second edition, page 597, the principle is stated thus: "After a submission has been made a rule of court it cannot be revoked; any attempt to do so is a contempt. Such a submission cannot be revoked, even by the consent of the parties, without the sanction of the court by its order." Several American cases, among which are some of our own, are cited as authority for the text. The only cases cited in opposition thereto are an English case (Vynior's case, 8 Rep. 80) and our own case of Power v. Power, 7 Watts, 205, 213. Too much importance should not be attached to this last case. The distinguished chief justice who wrote the opinion was reviewing general principles, and the one now under consideration was not involved in the case. The submission in that case was revoked by death. The only authority cited is an English case. No notice is taken of the Pennsylvania cases—including Horn v. Roberts, 1 Ashm. 45; Pollock v. Hall, 4 Dall. 222, and Ruston v. Dunwoody, 1 Binn. 42—which indicate a contrary doctrine. It is true, the general statement of the rule in Power v. Power, 7 Watts, 205, had been repeatedly quoted in its entirety in our cases, but it gains no force from that fact, because the point whether or not a submission under a rule of court is revocable is not involved in any of them. A consideration of the reasons for the difference between the English and the American rule will furnish the solution.

Under the English practice, submissions were of three kinds: 1. By agreement in writing or by parol. 2. By an order at nisi prius on agreement of the parties in a pending case; and 3. Under the statute 9 and 10 William III, chapter 15, section 1,

when the submission is made a rule of court although no cause is pending. In this state a method of voluntary arbitration is provided by the acts of 1705 and 1836, wherein the report or award shall have the effect of a jury's verdict. In other states similar enactments are in force.

In England, notwithstanding the rule purports to be an order of court whereby the matters in dispute are referred to the [493] final determination of the arbitrators, yet the authority of the arbitrators is regarded as derived from the submission of the parties, and not under the order of court. So firmly is this held that no reference of a cause pending shall operate to stay the proceeding in court, unless it be expressed in the rule that the parties have agreed that all proceedings in the action shall be stayed in the mean time. And when an award is duly made under a reference, by rule of court, and is returned to the court, no judgment is rendered thereon as upon a matter ascertained through the agency of the court. Anciently the successful party was left to his action to enforce performance of the award, and even now, although the court may grant an attachment for contempt, because of the nonperformance of the award, it is a matter of pure discretion to grant such attachment or not, and in many cases it is accordingly refused. It thus appears that the English practice is materially different from ours. While with us the consent of the parties is essential to the making of the order, when once made, the order exists proprio vigore, and when the subject matter of the case is referred by the court, the tribunal thus constituted takes cognizance of the matter referred under the authority of the court. For the time being, the controversy is withdrawn from the court, and this necessarily operates as a stay of proceedings therein. And when the award is returned, unless it can be impeached for just cause, judgment thereon follows, of course, as a judgment of the court follows upon any other matter legally ascertained by it or through the agency of its officers: Williams v. Craig, 1 Dall. 314; Tyson v. Robinson, 3 Ired. 333.

In Ferris v. Munn, 22 N. J. L., 164, the court, speaking of our American practice, said: "The proceedings and report of the referees are in the place of the act and verdict of a jury, and may be confirmed or set aside by the court, but one of the parties might as well undertake to rescind the venire or revoke the proceedings of a jury as the rule of reference or the proceedings of the referees." The evil consequences of a contrary practice are well outlined by the court in Pollock v. Hall, 4 Dall.

222, wherein it is said: "When both parties have agreed to resort to that tribunal, it would be inconsistent with the general nature of an agreement to permit one of them alone to withdraw from its jurisdiction. Feuds would be inflamed, instead [494] of being allayed, and suits multiplied, instead of being diminished, by such a construction of the law. . . . After an agreement to refer, a disclosure and hearing before the referees, and an opinion expressed or intimated by them upon the merits, a discontinuance cannot be regarded as a matter of right and would only be permitted upon very cogent reasons, such, perhaps, as would invalidate the award itself."

It follows from what has been said that a submission, such as that now before us, is irrevocable. It may be added that our brother Mitchell, when presiding in the common pleas of Philadelphia, considered a similar question and came to the conclusion that a submission when made a rule of court is irrevocable: Grimm v. Sarmiento, 18 Phila. 307.

There is no force in the suggestion that the agreement above quoted was not filed until after the attempted revocation of the submission. Where the latter is in a pending action, it is treated as under a rule of court, and it is unnecessary to so stipulate in the agreement: Manhattan Life Ins. Co. v. McLaughlin, 80 Pa. St. 55, and cases there cited. So also an application to set aside a reference treats it as a rule of court: White's Appeal, 108 Pa. St. 473.

We are satisfied that the court below erred in making absolute the rule of June 28, 1897, and hence the first specification of error must be sustained. The second specification is overruled.

The decree striking off the agreement of submission, award of arbitrators, and judgment entered thereon, is reversed and set aside, and rule to show cause discharged at the costs of the defendant, and it is further ordered that said agreement, award, and judgment be and the same are hereby fully reinstated, with like force and effect as if said rule had been discharged by the court below.

DEPOSITIONS—ADMISSIBILITY IN EVIDENCE—FORMAL REQUISITES.—Depositions, to be admissible, must be taken in the regular course of judicial examination, the witness must first be sworn, the questions must be put to him, and the answers, orally given, must be reduced to writing at the time of the examination, not prior thereto: Fisk v. Tank, 12 Wis. 276; 78 Am. Dec. 737. Unless signed by the witness at the time of the examination, they

are essentially defective: People v. Chapman, 62 Mich. 280; 4 Am. St. Rep. 857.

ARBITRATION AND AWARD—AGREEMENT TO ARBITRATE—WHEN IRREVOCABLE.—A party may revoke a submission at any time before an award is made. This rule applies only to cases of bare submission, and there is a line of cases holding that where a submission is part of an agreement containing other terms to be performed by the parties, and especially if those terms have been executed in whole or in part, the submission is not revocable: McKenna v. Lyle, 155 Pa. St. 599; 35 Am. St. Rep. 910. This distinction was not recognized at common law. Such revocation was allowable at any time before an award was made: Bank of Monroe v. Widner, 11 Paige, 529; 43 Am. Dec. 768; People v. Nash, 111 N. Y. 310; 7 Am. St. Rep. 747, and note. See monographic note to Commercial Union Assur. Co. v. Hocking, 2 Am. St. Rep. 566-571. Where, however, there is a consideration for an agreement to arbitrate, it is not revocable: Sweet v. Morrison, 116 N. Y. 19; 15 Am. St. Rep. 376.

McElree *v.* Darlington.

[187 Pennsylvania State, 593.]

EVIDENCE—INSPECTION OF BOOKS OF CORPORATION.—The books, papers, and accounts of a corporation in the hands of a receiver may be inspected by persons interested as stockholders or depositors, to secure evidence to aid in the prosecution of an officer of the corporation indicted for embezzlement of its funds.

EVIDENCE—SUPPRESSION OF CORPORATION BOOKS TO CONCEAL CRIME.—An officer or employé of a corporation who is under indictment for embezzlement of its funds cannot require of it a suppression or concealment of his own entries in its books, although the entries may furnish the material clue to his crime, and possibly afford satisfactory evidence of it.

C. H. Pennypacker and W. H. McElree, for the appellants.

A. P. Reid, Butler & Windle, J. F. E. Hause, and R. T. Cornwell, for the appellees.

594 McCOLLUM, J. The Chester County Guarantee, Trust, and Safe Deposit Company was incorporated July 28, 1885, under the corporation act approved April 29, 1874, are the supplement thereto approved May 24, 1881. It was authorized, among other things, to receive money on deposit. It invited, by advertisement in the newspapers, the making of such deposits, and, as an inducement to make them, offered to pay five per cent interest thereon. Its published statements heralded its soundness and solvency, and the result of its efforts in this direction was that a large number and amount of deposits were made with it. Mary A. Burnett, one of the appellants in this case, deposited on December 2, 1896, one thousand three hun-

dred dollars with it and received a certificate therefor from its president. Within two months thereafter a bill in equity was filed in the court of common pleas of Chester county by Elias Blair et al. against said corporation, alleging insolvency, and praying, inter alia, for an injunction restraining it, its officers and directors, from disposing of its assets, for an investigation of its affairs and the appointment of a receiver. The plaintiffs
595 in the bill were interested in the corporation as depositors, creditors, stockholders, et cetera, and the said Mary A. Burnett was one of them. The insolvency of the corporation was admitted in its answer filed February 12, 1897, and receivers were appointed the same day. On March 22, 1897, a large number of depositors, including Mary A. Burnett, presented a petition to said court of common pleas for the appointment of A. R. Barrett, formerly of the United States treasury department, to examine the books, papers, accounts, and securities of said corporation from 1891 to 1897 inclusive, at a salary of ten dollars per day for a time not exceeding thirty days, which petition was dismissed by the court on April 5th, following. At the April sessions, 1897, of the court of quarter sessions of the peace of the county of Chester, the president of the Chester County Guarantee and Safe Deposit Company was duly indicted for taking and receiving from Mary A. Burnett upon deposit on December 22, 1896, one thousand three hundred dollars, with knowledge that he and the corporation he represented were then insolvent, and with intent then and there willfully and fraudulently to embezzle the same.

On June 8, 1897, the appellants petitioned the court of common pleas for leave to examine the books, papers, and accounts of the corporation then in the hands of the receivers. The purpose of the examination was to ascertain the condition of the corporation when the deposit to which the indictment relates was made. Their petition was dismissed by the learned court below on the ground that the examination proposed by them would constitute an infringement or denial of the rights of the party indicted as above stated. This ruling was obviously made on the assumption that the books and papers were the property of said party, and that an examination of them by persons interested in the affairs of the corporation as shareholders, bondholders, or depositors was not admissible, because it might result in the discovery of transactions having a tendency to criminate him. But the books and papers of the corporation are not

the property of the officers or employés, nor are they intended to protect them against the consequences of the frauds they may have perpetrated in their respective spheres of labor or duty. An officer or employé of a corporation who is under indictment for embezzlement of its funds may not require of his employer a suppression or concealment of his own entries in its [590] books, although the entries may furnish the material clue to his crime and possibly afford satisfactory evidence of it. The appellees cite Logan v. Pennsylvania R. R. Co., 132 Pa. St. 404, and Boyle v. Smithman, 146 Pa. St. 255, as authority for the ruling complained of. But they are manifestly inapplicable to the question before us. The books in each case were the property and in possession of the defendant. In Logan v. Pennsylvania R. R. Co., 132 Pa. St. 404, the appeal was quashed on the ground that the order complained of was interlocutory, and in Boyle v. Smithman, 146 Pa. St. 255, it was held that in an action for penalties under the act of May 22, 1878 (Pub. Laws, p. 104), "the defendant can neither be compelled to testify against himself nor to produce his books to be used as evidence against him."

In accordance with the views above stated, we conclude that the learned judge of the court below should have authorized an examination by the appellants of the books and papers of the corporation, for the purpose of ascertaining its condition as to solvency or insolvency on December 2, 1896.

The order dismissing the petition is reversed and the petition is reinstated, with direction to the court below to enter an order in conformity with this opinion.

CORPORATIONS—RIGHT OF STOCKHOLDERS TO INSPECT BOOKS OF.—The records and books of a corporation, its stockholders have, at common law, the right to examine at reasonable times: Stone v. Kellogg, 165 Ill. 192; 56 Am. St. Rep. 240. This right cannot be denied on the ground that the applicant is unfriendly toward the president of the company, nor because he is accompanied by his attorney and stenographer to assist him in making the examination: Elsworth v. Dorwart, 95 Iowa, 108; 58 Am. St. Rep. 427, and note. A stockholder's right to make abstracts and memoranda of documents, books, and papers, is as full and complete as is his right to an inspection thereof: Swift v. Richardson, 7 Houst. 338; 40 Am. St. Rep. 127, and note. But the refusal of the right is justifiable when curiosity is the motive of the applicant, or when the object is manifestly in opposition to the interests of the corporation: Legendre v. New Orleans Brewing Co., 45 La. Ann. 669; 40 Am. St. Rep. 243, and note.

CASES

IN THE

SUPREME COURT

OF

UTAH.

STEPHENS *v.* UNION ASSURANCE SOCIETY.

[16 UTAH, 22.]

PLEADING — PERFORMANCE OF CONDITION, EVIDENCE OF WAIVER AS EVIDENCE OF.—If a pleading contains an allegation of the performance of a condition, it is not absolutely necessary to allege a waiver, because proof thereof is admissible under the general allegations.

INSURANCE—PLEADING WAIVER WHERE PERFORMANCE OF CONDITION IS ALLEGED.—In an action against an insurance company, where the complaint alleges the performance of all conditions of the policy required to be performed on the part of the plaintiff, it is not absolutely necessary for the complaint to allege a waiver of a condition requiring the insured to submit to an examination, and, in case of disagreement as to the amount of loss, that the same should be ascertained by competent appraisers, where it is alleged that the defendant refused to pay the loss, denied and disclaimed any liability in the premises whatsoever, and still refuses to pay the loss, and refuses to assign any reason for its action, although it does not affirmatively appear from the complaint that any dispute had arisen which called for an appraisal and award, and the complaint does not affirmatively show that the plaintiff and defendant could not agree upon the amount of the loss. Proof of the waiver is admissible under the general allegations.

TRIAL—ORDER OF EVIDENCE.—A court has discretionary power to admit testimony out of its order.

INSURANCE—DENIAL OF LIABILITY—DAMAGES RECOVERABLE AFTER REFUSAL TO APPRAISE OR ADJUST LOSS.—If an insurance company, after a loss, not only neglects and refuses to appraise property fully destroyed by fire, and to make a complete adjustment of the loss, but denies all liability, the insured may bring suit, and the court, in assessing damages, is not limited to the appraisal of property that was not fully destroyed, but may assess damages on account of property fully destroyed, though it was not appraised through the fault of the defendant.

INSURANCE—DENIAL OF LIABILITY—EFFECT OF OFFER TO ARBITRATE AFTER REFUSAL TO APPRAISE OR

ADJUST LOSS.—If the insured, after a loss, makes reasonable efforts for an adjustment, but the insurance company refuses, for an unreasonable length of time, to appraise or adjust the loss, and denies liability, an offer by it to arbitrate after the insured has brought suit, does not affect the plaintiff's right to recover.

APPEAL—HARMLESS ERROR.—A judgment for the plaintiff will not be disturbed because of rulings restricting the cross-examination of a witness, where the defendant could not have been prejudiced by them

Action on a fire insurance policy, brought by Elizabeth J. Stephens against the Union Assurance Society. There was a judgment for the plaintiff, and the defendant appealed.

Rhodes & Williams, for the appellant.

Rogers & Evans and A. G. Horn, for the respondent.

[24] MINER, J. On May 2, 1896, plaintiff filed her complaint to recover upon the policy of insurance issued to her by the defendant on November 18, 1895, upon certain personal property, owned by plaintiff, of the value of four thousand dollars. The policy of insurance, with its conditions, is set out in the complaint, and made a part of it. It is alleged that the property was insured against loss by fire for one year, in the sum of fifteen hundred dollars; that the property was destroyed by fire December 15, 1895, to plaintiff's loss in the sum of fifteen hundred dollars; that proofs of loss and interest were duly served. The complaint further alleges that the plaintiff had performed all the conditions of said policy on her part to be performed; that the defendant refused to pay said loss, denied and disclaimed any liability in the premises whatsoever; still refuses to pay said loss, and refuses to assign any reason for its action; and claims judgment in the sum of fifteen hundred dollars. The policy set out in the complaint contains the usual provision requiring the insured to submit to examination, and, in case of disagreement as to the amount [25] of loss, the same should be ascertained by competent appraisers, who should appraise the loss. It does not affirmatively appear from the complaint that any dispute had arisen which called for an appraisal and award. The case was tried before the court, without a jury. The court found all the material facts in favor of the plaintiff, and awarded judgment in the sum of fifteen hundred dollars. This appeal is taken from the judgment. Under this record, questions of law are the only questions to be reviewed.

At the commencement of the trial, the defendant objected to the introduction of any testimony in the case, for the reason that

the complaint did not state a cause of action. Under this objection it is claimed that the complaint does not allege that an arbitration was had, nor any fact to excuse the nonperformance of this provision of the policy of insurance. Section 3243 of the Compiled Laws of 1888 provides: "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part." The complaint does not affirmatively show that the plaintiff and defendant could not agree upon the amount of the loss. This same question arose in the case of West v. Norwich etc. Ins. Soc., 10 Utah, 442, where this court held that, where a pleading contains an allegation of the performance of a condition, it is not absolutely necessary to allege a waiver, because proof thereof is admissible under the general allegations: 2 May on Insurance, sec. 589; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. St. 568.

We are of the opinion that the allegations in the complaint were sufficient, under the statute, to admit the testimony under the general allegations. This court has so held, and we are not now disposed to change the ruling. It is true that some testimony was admitted out of [26] its order, but the court had the discretionary power to admit it.

Among other matters, the court found that the property insured was almost entirely destroyed by fire December 15, 1895, but the charred remains of some articles remained; that the plaintiff was damaged in the sum of three thousand five hundred dollars; that on the eighteenth day of December, 1895, the defendant's adjuster and the plaintiff each selected an appraiser to appraise the loss, and each appraiser examined the property, and appraised the charred remains of the property at five hundred dollars; that the appraiser appointed by the plaintiff insisted upon appraising the property that was totally destroyed by fire, but the appraiser appointed by the defendant company would not consent to appraise anything except what could be seen and was not consumed by fire. Thereupon said appraisers made a report in writing, and delivered the same to the defendant's adjuster, who since such time has retained the same. Thereupon the plaintiff requested the defendant's adjuster to have the property actually consumed appraised, which request was denied. The plaintiff then furnished the adjuster, at his request, with a list of the property destroyed by fire, but was unable to furnish the original invoices, as none had ever been received. Thereupon proof

of loss was made, and the defendant's adjuster, in behalf of the defendant, denied and disclaimed all liability on the part of the defendant, and claimed that the insured property was not the property of the plaintiff. Plaintiff then placed the matter in the hands of her attorneys January 13, 1896; and thereafter the attorneys, by way of compromise, attempted to have an amicable arbitration of the matter in dispute, but no agreement could be arrived at, and the defendant company did not admit their liability in the premises. On May 21, 1896, this suit was instituted; and [27] thereafter, on the same day, the defendant served upon the attorneys for the plaintiff a notice of submission to arbitration, under the policy, and also demanded that plaintiff submit to an examination, which was refused. The court also found that the plaintiff was entitled to the sum of fifteen hundred dollars, the amount of the policy, and rendered judgment accordingly. The defendant contends that these findings were not supported by the testimony. While there is some conflict in the testimony, there is evidence in the record tending to support the findings. The findings show that the defendant neglected and refused to appraise the property that was totally destroyed by fire, and to make a complete adjustment of the loss, and denied all liability to the plaintiff under the policy. The fire occurred December 15, 1895; and suit was brought May 21, 1896, after all reasonable efforts had been made for adjustment. The proposal to arbitrate was not made until after the suit was brought, and the appraisal of the remains of the property at five hundred dollars was not a complete appraisal of the property destroyed by fire. This basis upon which to compute the loss was too narrow, and was unjust. That the whole loss was not appraised was the fault of the defendant. The company should not be allowed to take advantage of its own wrong. In assessing the damages, the court was not limited to the appraisal of the property that was not fully destroyed. The defendant company denied liability, and having refused to appraise or adjust the loss, absolved the plaintiff from further delay in bringing her action. A claim under such a policy cannot be tied up for an unreasonable period, without fault or against the will of the claimant, by unreasonable delays on the part of the insurance company, and after it has denied liability under the policy. Under such circumstances, the company could acquire no new [28] right by offering to arbitrate after the action was brought: Sling v. National Assur. Co., 7 Utah, 441; Uhrig v. Williamsburgh etc. Ins. Co., 101 N. Y. 362; Continental Ins. Co. v. Wilson, 45 Kan. 250; 23 Am. St.

Rep. 720; Randall v. American Ins. Co., 10 Mont. 340; 24 Am. St. Rep. 50; Western Home etc. Ins. Co. v. Putnam, 20 Neb. 331; Home Fire Ins. Co. v. Kennedy, 47 Neb. 138; 53 Am. St. Rep. 521; Wainer v. Milford etc. Ins. Co., 153 Mass. 335.

There are many errors assigned upon the refusal of the court to admit or reject certain testimony. Upon an examination, we find that many of these assignments of error were dependent upon the question settled by this opinion. The cross-examination of witness Stephens was too much restricted; but as the trial was before the court without a jury, and as it appears the defendant could not have been prejudiced by the rulings, we are not disposed to disturb the judgment on that account. We find no reversible error in the record. The judgment of the court below is affirmed, with costs.

Zane, C. J., and Bartch, J., concur.

PLEADING.—A GENERAL ALLEGATION OF PERFORMANCE by a plaintiff of the conditions of a contract is sufficient: California Steam Nav. Co. v. Wright, 6 Cal 259; 65 Am. Dec. 511.

INSURANCE—PLEADING.—A CONDITION FOR ARBITRATION is not effective in cases where the insurer denies the general right of the insured to recover anything: Kahn v. Traders' Ins. Co., 4 Wyo. 419, 450; 62 Am. St. Rep. 47, 59. In such cases, an award by arbitrators or appraisers, provided for in the policy, is not absolutely essential to a cause of action, nor is it necessary for the insured to plead either a submission of the amount of loss to appraisers and an award by them, or facts showing that the insured has committed a breach of the agreement to arbitrate: Kahn v. Traders' Ins. Co., 4 Wyo. 419; 62 Am. St. Rep. 47. If a loss has not been arbitrated within a reasonable time, arbitration must be deemed to have been waived by both parties, and an action to recover for the loss may be sustained: Note to Vangindertaelen v. Phenix Ins. Co., 33 Am. St. Rep. 32. Compare Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9; 45 Am. St. Rep. 105.

TRIAL.—THE ORDER OF INTRODUCING EVIDENCE is within the discretion of the trial court: Peterson v. Wood Mowing etc. Co., 97 Iowa, 148; 59 Am. St. Rep. 399; Kansas City v. Bradbury, 45 Kan. 381; 23 Am. St. Rep. 731; Hannen v. Pence, 40 Minn. 127; 12 Am. St. Rep. 717; Ponca v. Crawford, 23 Neb. 662; 8 Am. St. Rep. 144.

APPEAL.—HARMLESS ERROR is no ground for reversal of judgment: Stewart v. State, 35 Tex. Crim. Rep. 174; 60 Am. St. Rep. 35; Osborne v. Francis, 38 W. Va. 312; 45 Am. St. Rep. 859.

PECK *v.* GIRARD FIRE AND MARINE INSURANCE CO.

[16 UTAH, 121.]

INSURANCE—MORTGAGEE—SUIT BY.—In an action upon a policy or fire insurance on mortgaged property, where the loss, if any, is payable to the mortgagee, as his interest may appear, he may, in case of loss, recover the whole amount thereof, in his own name, if the mortgage debt exceeds the loss.

A DEED TO SECURE A DEBT, though absolute in form, amounts merely to a mortgage, and does not transfer the title to the property.

INSURANCE—A MORTGAGE DOES NOT WORK A "CHANGE" OF INTEREST.—A mortgage given on property by the insured does not effect a change of interest, in violation of a policy which prohibits such change. A "change" of interest or title means a transfer, not an encumbrance.

Action by Peck against the insurance company. There was a judgment for the plaintiff, and the defendant appealed.

Richards & Macmillan and A. E. Pratt, for the appellant.

A. R. Heywood and J. E. Bagley, for the respondent.

123 ZANE, C. J. This is an action on a policy executed by the defendant to Erastus Christofferson, insuring his house against fire, in the sum of one thousand dollars. The policy contained two provisions on which the defendant bases its defense. The language of the first is, "Loss, if any, payable to Edwin A. Peck, mortgagee, as his interest may appear"; and the language of the second is, "This policy shall be void if any change, other than by the death of an insured, takes place in the interest, title, or posession of the subject of the insurance, ... whether by legal process or judgment, or by voluntary act of the insured, or otherwise." The debt secured by the mortgage was seven hundred and sixty-six dollars and sixty-five cents. During the term of the insurance the property was damaged by fire in the sum of six hundred and ninety-two dollars and fifty cents, and, upon a trial, judgment was rendered against the defendant for that amount, and for costs. The case is before us for review.

The language of the provision first quoted amounts to an agreement by the defendant with Christofferson to pay the plaintiff, to the extent of the loss, if any, not exceeding one thousand dollars, his mortgage debt. The defendant insists that the plaintiff could not sue alone; that the mortgagor should have united with him as plaintiff. We understand the weight of authority to be that a party may sue on a promise made, upon a sufficient consideration, to another, for his use and benefit. This

court so held in the case of Thompson v. Cheesman, 15 Utah, 43. When the mortgage debt exceeds the loss, the rule, as we hold it, is that the mortgagee may recover the whole in his own name; but [124] when the loss exceeds the debt the mortgagor and mortgage may unite as plaintiffs, or each may sue for his own share, unless by the terms of the policy the whole is payable to the mortgagee: Palmer Sav. Bank v. Insurance Co. of North America, 166 Mass. 189; 55 Am. St. Rep. 387; Maxcy v. New Hampshire etc. Ins. Co., 54 Minn. 272; 40 Am. St. Rep. 325.

The defendant also contends that Christofferson forfeited plaintiff's right to the loss by a conveyance of the property after the insurance, and before the fire, to one Peterson, in violation of the second provision quoted. No change of possession was proven. The transaction relied upon as a conveyance consisted of a deed to the property, absolute in form, but in effect a mortgage, to secure the payment of five hundred dollars. The deed did not pass the title. It simply created a lien on Christofferson's title and interest in the property to secure the debt: Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1; Thompson v. Cheesman, 15 Utah, 43.

The defendant urges that a change of interest was effected by the mortgage. Doubtless there is a conflict of authority as to the rule, but we are disposed to hold that such language, in a policy like this one, means a transfer of interest; that it does not mean an encumbrance merely. The title and interest of the mortgagor remain in him, subject to the encumbrance: Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1; Judge v. Connecticut etc. Ins. Co., 132 Mass. 521; Commercial Ins. Co. v. Spankneble, 52 Ill. 53; 49 Am. Rep. 582; Richards on Insurance, sec. 147.

In the case of Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1, the policy contained a condition similar to this one; and the insured had executed two deeds, absolute in form, subsequent to the insurance, to secure a debt. The court said: "It follows from these authorities that the legal position of Mrs. Sleight, as the owner of the property, was not [125] changed or affected by the deeds referred to, and that such instruments did not bring the transaction within either the letter or the spirit of the contract. The interest of Mrs. Sleight in the property remained the same after as before the delivery. It is true that, through a course of legal proceedings, the title to the property might finally be acquired by some one, if the debt was not paid; but this would be equally true if Mrs. Sleight had given to Moloughney her note

of hand for the debt, and it had been followed by judgment, and a sale of the land under execution." Our conclusion is, that this suit was properly brought by the plaintiff; that the deed of Christofferson, though absolute in form, was in effect a mortgage, and did not change, or transfer to Peterson, his interest in, or his title to, the property, or violate the condition or prohibition relied upon or forfeit plaintiff's right to the loss proven.

Judgment affirmed.

Bartch and Miner, JJ., concur.

MORTGAGES.—A DEED, though absolute in form, is in fact a mortgage, when given to secure the payment of money: State Bank v. Mathews, 45 Neb. 659; 50 Am. St. Rep. 565; Wallace v. Smith, 155 Pa. St. 78; 35 Am. St. Rep. 868.

INSURANCE.—A MORTGAGE is not a sale or transfer of title within the prohibition of an insurance policy: Note to Hench v. Agricultural Ins. Co., 9 Am. St. Rep. 75.

INSURANCE.—AN ACTION BY A MORTGAGEE may be maintained on a policy of insurance issued to and in the name of the mortgagor, providing that the loss shall be payable to the mortgagee as his interest may appear, where the amount of the debt secured by the mortgage exceeds the amount of the insurance and the whole value of the property: Lowry v. Insurance Co., 75 Miss. 43; 65 Am. St. Rep. 587. Compare Hocking v. Insurance Co., 99 Tenn. 729; 63 Am. St. Rep. 862.

MAYNARD *v.* LOCOMOTIVE ENGINEERS' MUTUAL LIFE AND ACCIDENT INSURANCE ASSOCIATION.

[16 UTAH, 145.]

INSURANCE—MUTUAL BENEFIT SOCIETIES—RECOVERY FOR "TOTAL AND PERMANENT LOSS OF EYESIGHT." A locomotve engineer, to whom a mutual benefit association has issued a policy of insurance, and who receives an injury, while engaged in a lawful employment, which causes the total and permanent loss of the sight of one eye, is entitled to recover therefor, where a by-law of the association provides that any member shall receive the full amount of his policy if, while engaged in any lawful occupation, he receives bodily injuries which alone cause the "total and permanent loss of eyesight," particularly where such injury disables him from pursuing his usual and accustomed occupation.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—BY-LAW—CONSTRUCTION OF—AMENDMENT.—If a by-law of a mutual benefit society, providing that any member shall receive the full amount of his policy if, while engaged in any lawful occupation, he receives bodily injuries which alone cause the "total and permanent loss of eyesight," is amended after a member, while engaged in a lawful employment, receives an injury which ultimately causes the total and permanent loss of the sight of one eye, but before such loss of eyesight becomes permanent, so that the expression "total and permanent loss of eyesight" is made to read "total and permanent loss of one or both eyes," the only effect of the amendment is simply to make the true meaning of the words more apparent.

DEFINITIONS—"TOTAL AND PERMANENT LOSS OF EYESIGHT."—If a person has become permanently blind in one eye, he may, with strict propriety, be said to have sustained "total and permanent loss of eyesight."

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—BY-LAWS—INTERPRETATION OF.—The terms of a by-law of an association or corporation, organized for the purpose of mutual benefit and relief, must be interpreted liberally and reasonably, and not so as to favor the forfeiture of the rights of its members, or those dependent upon them.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—BY-LAWS—INTERPRETATION OF.—If the terms of a by-law of an association or corporation, organized for the purpose of mutual benefit and relief, are susceptible of two constructions, that must be adopted which will more nearly carry out the benign object of the association, and sustain the claim of an injured member.

PLEADING—OBJECTION TO SUFFICIENCY OF COMPLAINT.—When a complaint states a cause of action in general terms, an objection that the allegations are indefinite, or uncertain, or ambiguous, cannot avail the objector after judgment, if the objection was not made, in the proper way, before judgment.

APPEAL—ANSWER OF WITNESS—NONREVERSIBLE ERROR.—It is not reversible error for a court to receive, against an objection, the answer of a witness, which calls for a conclusion, though it may be improper, where the case is being tried before the court without a jury, where the facts on which the conclusion is based have all been stated in evidence, and where the evidence, regardless of such answer, is sufficient for the court to enter judgment in favor of the opposite party.

PRACTICE—FINDINGS OF FACT—EFFECT OF FAILURE TO MAKE.—It is not error for a court to fail to make findings of fact on immaterial issues raised by his pleadings.

APPEAL—FINDINGS OF FACT—EFFECT OF FAILURE TO MAKE.—A failure to make findings of fact on material issues raised by the pleadings is not reversible error where they, if found, must necessarily have been found adverse to the appellant, and when those already found were sufficient to support the judgment.

Action by Maynard against the defendant association on a contract of insurance. There was a judgment for the plaintiff, and the defendant appealed.

Richards & Macmillan and A. E. Pratt, for the appellant.

H. H. Henderson, for the respondent.

147 BARTCH, J. At the trial of this cause, the defendant objected to the introduction of any evidence, on the ground that the amended complaint did not state a cause of action. The objection was overruled, and the action of the court is assigned as error, and raises the most important question in the case, which is whether the plaintiff has a right to recover, under the defendant's by-law in force at the time he received the injury of which he complains, the same having been amended before the

cause of action became complete. The by-law in question reads as follows: "Any member, while engaged in any lawful occupation, receiving bodily injuries, which alone shall cause total and permanent loss of eyesight, shall receive the full amount of his policy. In case of loss of eyesight, the certificate must not be made out in less than one year, and must be signed by two experienced oculists and surgeons, and in any case the association may designate one of the medical examiners." This by-law was amended on May 26, 1894, so that the expression "total and permanent loss of eyesight" was made to read "total and permanent loss of one or both eyes." It appears from the evidence, and the court so found, that in June, 1893, the plaintiff, who was a locomotive engineer, accidentally, while engaged in a lawful employment, fell into a pit, and received an injury on the head, which immediately [148] affected his eyesight; and that about June, 1894, the loss of the sight of his right eye became permanent. It also appears that the plaintiff has been a member of the association in good standing since August, 1872. It will thus be noticed that the injury was received while the former by-law was in force, but the loss of eyesight did not become permanent until after it was amended; and that, under the by-laws, no cause of action became complete until the expiration of one year after the loss of eyesight became permanent.

This case was before us on a former occasion on appeal, and is reported in Maynard v. Locomotive Engineers' etc. Assn., 14 Utah, 458. We there held that the amended by-law, on which the action was then founded, was not by its terms retroactive, and that, considered by itself, it did not include a case like the one at bar. The case was reversed on the point that the judgment of the court was not supported by the findings of fact, the pleading not responding to such findings; but, as we were not satisfied that the plaintiff could not ultimately recover if the complaint were amended so as to present the issues suggested by the record, a new trial was ordered, and leave granted to amend the pleading. The complaint was thereupon amended, and now sets out the original by-law above quoted, as well as its amendment, and we are of the opinion that the plaintiff is entitled to recover under the former by-law, being the one in force at the time he received the injury. The right of recovery in such a case as this appears to be within the fair intendment of its provisions, and the amendment simply makes their true meaning more apparent. The by-law does not provide that the insured will not receive the amount of his policy unless the injuries are such as to

cause the loss of the sight of both eyes. There is no express provision, as will be observed, limiting the insurance [149] to a total and permanent loss of the sight of both eyes; and upon reflection that the defendant claims and is supposed to be a beneficent institution, having for its object the mutual protection and relief of its members, and the payment of stipulated sums to the families of the unfortunate and disabled through accident among them, and that in a case like this the total and permanent loss of one eye disables, as appears from the record, the insured from pursuing his usual and accustomed occupation, it would be a rigid construction that would limit a recovery to cases of total blindness in both eyes, and thus effectuate by implication what the association failed to provide for in express terms. No such result is a necessary sequence to the language employed; for, where a person has become permanently blind in one eye, he may, with strict propriety, be said to have sustained "total and permanent loss of eyesight." The terms of the by-law in question must be interpreted liberally and reasonably, and, as they appear to be susceptible of two constructions, that must be adopted which will more nearly carry out the benign purpose of the association and sustain the claim of the injured. The provision will not be scrutinized for the purpose of enabling the organization to escape liability to any of its members, or for the purpose of creating limitations, in favor of the association, which do not satisfactorily appear within the terms of the by-law. Where associations or corporations are organized for the purpose of mutual benefit and relief, their by-laws will not be so interpreted as to favor the forfeiture of the rights of its members or those dependent upon them. "The by-laws of mutual benefit societies should be construed liberally, and with a view to effectuate the benevolent purposes of their organization. When there is any ambiguity or inconsistency in the terms of [150] such by-laws, that construction shall be given to them which is most favorable to the rights of the members": Niblack on Benefit Societies and Accident Insurance, secs. 17, 143; Bacon on Benefit Societies, sec. 86; Teutonia Fire Ins. Co. v. Mund, 102 Pa. St. 89; Burkhard v. Travelers' Ins. Co., 102 Pa. St. 262; 48 Am. Rep. 205; Humphreys v. National Ben. Assn., 139 Pa. St. 264; Hoffman v. Aetna Ins. Co., 32 N. Y. 405; 88 Am. Dec. 337.

It is also contended for the appellant that it was essential to plaintiff's recovery that he should have alleged that he received a "bodily" injury. It is alleged that "this plaintiff received an injury while engaged in a lawful vocation, which caused the total

and permanent loss of his right eye." We think this allegation sufficient to withstand the objection that the complaint did not state a cause of action. At most, it is merely indefinite or uncertain, as not stating the particular injury; and defects of this character must be taken advantage of before judgment by proper pleading, or they will be waived. The subject of defective pleading was considered in the case of Mangum v. Bullion etc. Min. Co., 15 Utah, 535, to which we refer for a more extended discussion on this point. Where, as in this case, the complaint states a cause of action in general terms, the objection that the allegations are indefinite or uncertain or ambiguous cannot avail the objector after judgment, when the objection was not made in the proper way before judgment.

It is further insisted that the court erred in permitting the plaintiff, over the objection of the defendant, to answer the following question: "Was the loss of eyesight caused by the injury?" This question was subject to the objection that it was calling for a conclusion, and should not have been permitted to be answered; but in view of the facts that the case was tried before the court without a jury, and that, regardless of the answer to the question, the evidence was sufficient for the court to enter
151 judgment in the plaintiff's favor, and the facts on which the conclusion was based having all been stated in evidence, we are of the opinion that the receiving of the answer was not reversible error.

There are several questions presented in the record respecting the finding of fact and the failure to make such findings, but, upon examination of each of them, we perceive no reversible error. The facts found are ample to sustain the judgment, and appear to be fair deductions from the evidence, and made on all material issues properly raised in the pleadings. If other facts had been found, they would necessarily have been prejudicial to the appellant. In Groome v. Ogden City Corp., 10 Utah, 54, this court held that it was not error for the court to fail to make findings on immaterial issues, and that even on material issues a failure to find facts was not reversible error if, when found, they must necessarily have been adverse to the appellant, and when those already found were sufficient to support the judgment. We find no reversible error in the record.

The judgment is affirmed.

Zane, C. J., and Miner, J., concur.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—AMENDMENT AND CONSTRUCTION OF BY-LAWS.—A mutual benefit society has the power to make, alter, abrogate, or amend its by-laws, but it cannot do this to the prejudice of rights previously vested in the members; and, if the constitution of such a society contains two inconsistent provisions, that most favorable to the insured will be adopted: See monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 556, on features of the law specially applicable to mutual or membership life or accident insurance. A new law of a mutual benefit society will not be interpreted to be retroactive in its operation, unless by its terms it is clearly intended to be so: Roxbury Lodge v. Hocking, 60 N. J. L. 439; 64 Am. St. Rep. 596, and note. A forfeiture of the rights of members of such a society is not favored: Note to Bankers' etc. Assn v. Stapp, 19 Am. St. Rep. 783, on mutual benefit associations.

APPEAL—FINDINGS OF FACT.—A failure to make findings of fact is not reversible error where, if made, they must necessarily have been prejudicial to the appellant, and those found are sufficient to support the decree: Hague v. Nephi Irr. Co., 16 Utah, 421; post, p. 634.

APPEAL — PLEADING — SUFFICIENCY. — An objection not made, or a question not raised, in the trial court will not be considered on appeal: Note to Greene v. Greene, 59 Am. St. Rep. 567; but, the fact that a complaint fails to state a cause of action may be first raised in the appellate court: Note to Tate v. Bates, 54 Am. St. Rep. 724.

WITNESSES—INFERENCES.—After a witness has stated facts, he cannot testify as to his inferences. They are for the jury: Enos v. St. Paul etc. Ins. Co., 4 S. Dak. 639; 46 Am. St. Rep. 796.

APPEAL.—ERROR WITHOUT PREJUDICE is no ground for a reversal of judgment: Note to Plymouth County Bank v. Gilman, 46 Am. St. Rep. 791.

NORTH POINT CONSOLIDATED IRRIGATION COMPANY v. UTAH AND SALT LAKE CANAL COMPANY.

[16 UTAH, 246.]

WATER COMPANIES—PURPOSE OF—HOW TO BE DETERMINED.—The purposes and powers of an incorporated canal company to carry water must be determined from its charter, and not from the opinions of witnesses.

WATER COMPANIES—CHARTER OF—WHAT CONSTITUTES.—If a canal company, with a special charter, and organized to carry water, is incorporated under the general laws of the state, its articles of incorporation, under such laws, have the effect of a charter, and in them its purposes and powers must be found.

WATER COMPANIES—POWERS WHICH MAY BE EXERCISED.—A corporation, organized under the general laws of the state, such as a canal company to carry water, can exercise only such powers as are expressly mentioned in its charter, and such as may be necessary to execute those expressed.

WATER COMPANIES — INCONSISTENT RIGHTS — BEFOULING WATER—EXCLUSION.—Two rights, which are perfectly inconsistent, cannot be enjoyed together. Thus a canal cannot be used to carry water fit for irrigation and water unfit for irrigation at the same time, for a use of it for one of the purposes is an exclusion of the other. Hence, if an incorporated canal com-

pany is authorized, by its charter, to divert water from a stream, to prevent overflow, and also for the purpose of irrigation and cultivation of lands, the use of its canal for the drainage of water unfit for irrigation excludes the use of its water for irrigation or domestic purposes, and the drainage through it of water unfit for irrigation is therefore excluded.

WATER COMPANIES—GRANT BY, OF RIGHT TO TAKE WATER.—An incorporated canal company, having authority, under its charter, to use its canal for the purpose of irrigation as well as drainage, may lawfully grant a right to take water from its canal for irrigation and domestic purposes, and to construct dams and gates to divert it.

WATER COMPANIES—RATIFICATION OF CONTRACT TO TAKE WATER.—If an incorporated canal company verbally grants to an unincorporated association owning a canal the right to take water from its canal for irrigation, culinary, and other domestic purposes, and the association soon afterward becomes an incorporated irrigation company, succeeding to the property and rights of the unincorporated association, the canal company, by entering into a written contract with the newly incorporated company, granting it the right to take water from its canal for the same purposes, thereby ratifies the verbal agreement.

WATER COMPANIES—MISTAKE AS TO GRANTEE IN CONTRACT TO TAKE WATER.—If an incorporated canal company grants a right to take water from its canal for irrigation, culinary and other domestic purposes, but, by mistake, the name of an unincorporated association, owning a canal, is used as grantee instead of its successor in interest, an incorporated irrigation company, it being the intention of both parties to have the grant made to the irrigation company, it must be held that the contract was made with the incorporated company.

WATERS — SEEPAGE — RIGHT TO FLOW ON TO ANOTHER'S LAND.—A proprietor of higher lands is entitled to the benefit of the natural flow therefrom, onto the lands of another, of surface or other water not brought there by artificial means, but it is otherwise as to water which is brought there by artificial means, such as ditches.

WATERS—SEEPAGE FROM IRRIGATED LANDS.—Seepage from lands, caused by irrigation water brought in canals or other artificial ditches, cannot be regarded as natural seepage or drainage.

WATER COMPANIES — CONTAMINATED SEEPAGE — RIGHT TO CONDUCT INTO PURE WATER CANAL.—Canal companies have no right to conduct water through their canals onto lands irrigated by them, and then, by means of drain ditches, conduct the seepage and surplus water therefrom, rendered unfit for irrigation or domestic uses by contract with alkaline or mineralized matter, into a canal, out of which persons have the right to take water for useful purposes.

WATER COMPANIES—RIGHT TO CUT RIM OF LAKE.—The fact that a lake overflows its rim, when the water is high, and that water, unfit for irrigation or domestic purposes, runs therefrom into a canal from which persons have the right to take water for useful purposes, does not authorize another canal company to cut a drain ditch through the rim, or higher intervening ground, and conduct such water as will not overflow into the canal intended to carry water for useful purposes.

WATER COMPANIES—SEEPAGE WATER—DUTY TO CONTROL.—A canal company which diverts water from a stream

for the purpose of irrigation must, under the statutes of Utah, control the seepage and surplus water from lands irrigated by it so as not to injuriously affect the rights of others.

EASEMENT—TITLE BY PRESCRIPTION—WHAT IS REQUIRED.—The adverse use of an easement will give title by prescription, if accompanied by the same facts as to length of time, exclusiveness, and acquiescence which are necessary to give title to real estate, by adverse possession, under the statute of limitations. It is otherwise if such facts do not exist; and the facts relied upon to give title to an easement by prescription can only be applied as to time when analogous in other respects.

NUISANCE—BEFOULING PURE WATER.—The discharge of impure water, such as that which has been mixed with alkali, or minerals, into a canal whose waters are used for irrigation or other useful purpose, creates a nuisance.

NUISANCE, PRIVATE — PRESCRIPTIVE RIGHT TO MAINTAIN.—To gain a prescriptive right to maintain a private nuisance, the use must be adverse, under a claim of right, uninterrupted, and continuous for twenty years, with the knowledge of the party whose right is invaded.

NUISANCE, PUBLIC—PRESCRIPTIVE RIGHT TO MAINTAIN.—The general rule is, that there can be no prescriptive right to maintain a public nuisance. Time will not sanctify it.

NUISANCE, PUBLIC—BEFOULING PURE WATER.—Under the statutes of Utah, a canal company creates a public nuisance by draining seepage and surplus water from lands irrigated by the company, into another canal, carrying water for a useful purpose, from which three or more persons obtain water for irrigation, culinary, and other domestic purposes, where the water last-mentioned is thus contaminated, befouled, and rendered unfit for use by the presence of alkali, salt, or mineral.

APPEAL—EQUITY CASES—REVIEW OF FINDINGS OF FACT.—An appeal may be taken, in equity cases, on questions of fact as well as of law, and the appellate court may go behind the findings, weigh all the evidence, and decide according to its preponderance; but the finding of the court below will not be disturbed when the evidence as to a fact is so evenly balanced, or the proof of it is so unsatisfactory, as to cause the mind to hesitate and pause as to the side on which it preponderates, and to leave it in grave doubt..

Suit by the North Point Consolidated Irrigation Company against the Utah & Salt Lake Canal Company and others for damages, and an injunction restraining the defendants from discharging befouled water into a certain canal, known as the Jordan & Salt Lake Surplus Water Canal, and to compel them to fill up certain ditches. This last-named canal was referred to as the "Surplus" canal. The object or business of the "Surplus" Canal Company was to divert water from the Jordan river for the uses and purposes stated in the opinion. Several canal and irrigation companies each owned and operated a system of canals or water ditches to the south and west of the plaintiff's canal, and on higher ground, through which they took water from the river Jordan for the purpose of irrigating the lands lying

below them. These canals took water from the Jordan river miles above the head of the surplus canal, and the plaintiff's canal, through which it received its water for irrigation, culinary, and other domestic purposes, connected with the Surplus canal about four miles below its head at the Jordan river. The irrigating waters used by the defendant canal companies, after percolating through and draining alkaline and mineralized lands, formed a chain of several small lakes, or ponds, and sloughs, and to relieve them, as well as the lands submerged by them, and lands adjacent thereto, the defendant canal companies constructed and maintained a series of artificial channels, connecting each and all of these several lakes, or ponds, and sloughs, with a lake known as "Decker's" lake. The seepage from large tracts of land irrigated by water from these canals flowed into Hunter's lake and Silver lake. Much of it was conducted there by artificial ditches, and the seepage so collected was conducted into these small lakes or ponds, and into Decker's lake, and from the latter, a distance of about two miles, by means of a drain ditch, into White lake, which formed part of the Surplus canal. Much of this seepage was from alkaline or mineralized lands, and this seepage so conducted to, and emptied into, the Surplus canal was unfit for domestic or irrigation purposes. In fact, it killed vegetation, and rendered the land irrigated by it unproductive. The North Point Canal Company, an unincorporated association, had the verbal agreement, mentioned in the opinion, with the Surplus canal company to connect with the latter's canal, and to take water from it for irrigation, culinary, and other domestic purposes, but two days later the association became an incorporated company, known as the North Point Consolidated Irrigation Company, which succeeded to the rights of the North Point Canal Company, and acquired the same right as the latter company by a written contract to take water from the Surplus canal for irrigation, culinary, and other domestic purposes; but the grant was made, by mistake in the use of names, to the North Point Canal Company, instead of its successor, the irrigation company, though it was the intention of both parties to make the grant to the last-named company, which received the contract and filed it for record. The Surplus Canal Company was incorporated on March 9, 1885, but on December 13, 1886, it transferred its canal to Salt Lake City and Salt Lake County, upon condition that the grantee should keep the canal open and free to accomplish the purposes for which it was constructed for the period of ten years from

the date of the transfer. The plaintiff's complaint was filed on March 9, 1897, but it was dismissed, and a decree entered for the defendants, from which the plaintiff appealed.

E. W. Taylor, C. F. and F. C. Loofbourow, and Moyle, Zane & Costigan, for the appellant.

Richards & Richards, for the respondent canal companies.

Waldemar Van Cott, Graham F. Putnam, and Ray Van Cott, for the respondent Salt Lake County.

William McKay and D. B. Hempstead, for the respondent Salt Lake City.

262 ZANE, C. J. The plaintiff claims the legal right to take and use water from the Jordan & Salt Lake Surplus canal for irrigation and domestic purposes; that it has an interest in and right to the Surplus canal, and to its waters, to that extent; and that, in view of the pleadings and evidence, the court should protect that right by a writ of injunction; while the Utah & Salt Lake Canal Company, the South Jordan Canal Company, and the North Jordan Irrigation Company, three of the defendants, deny that plaintiff has any interest in the Surplus canal, or any right to take water therefrom for irrigation or other purposes, and they claim the right to use the same canal to carry the seepage and surplus waters from the lands irrigated by them, from their canals, though its waters may be thereby so polluted and befouled by alkali or other substances as to render it unfit for irrigation or domestic purposes. It is plain that the Surplus 263 canal cannot be used for both purposes. It cannot be used to carry water fit for irrigation, and water unfit for irrigation, at the same time. The use of the Surplus canal to carry water unfit for irrigation or domestic purposes is, in effect, an exclusive right to the use of it, so far as the use of it to carry water for irrigation or domestic purposes goes; and the right to use it to carry water for irrigation or domestic purposes, in effect, excludes the use of it to carry water unfit for irrigation or domestic purposes. The two rights are perfectly inconsistent, and cannot be enjoyed together.

This brings us to the question, has the plaintiff the sight to take or use water from the Surplus canal for irrigation, culinary, or other domestic purposes? The plaintiff insists that the Surplus canal was constructed to relieve the Jordan river during freshets or high water; to carry a portion of its water and over-

flow water at such times, and as a drainage canal to that extent; and also for the purposes of irrigation and domestic purposes; while the defendants claim it was constructed alone for the purpose of drainage to carry the seepage and surplus water from the lands irrigated by the defendant canal companies and others, as well as to relieve the Jordan river and adjacent lands submerged by it in times of freshets and high water. The understanding of various persons as to the object of the incorporation known as the Jordan & Salt Lake Surplus Water Canal Company was received in evidence by the court below. While a special charter was not granted by the legislature of the late territory to the Jordan & Salt Lake Surplus Water Canal Company, and it was incorporated under a general law, its articles of incorporation under that law were given the effect of a charter; and in them its purposes and powers must be found—from them its franchise or franchises must be ascertained. Such a corporation [264] can only use such powers as are expressly mentioned in its charter, and such as may be necessary to execute those expressed. In the case of Thomas v. Railroad Company, 101 U. S. 71, the court said: "Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." The object and business of the Jordan & Salt Lake Surplus Water Canal Company, expressed in its charter, was "to construct [the canal described] for the purpose of diverting a portion of the said Jordan river from its present channel, and causing it to flow into" Salt Lake at a point named, "thereby preventing the western portion of Salt Lake City and the lands along the Jordan river from being submerged in times of high water, and making practicable the draining, irrigating, and cultivating of large tracts of land hitherto unavailable for agricultural purposes; and to this end the association may construct and maintain all necessary dams, headgates, flumes, and other means which may be necessary to control, regulate, and distribute said water for the purposes herein indicated." The objects were to divert a portion of the waters of the river in times of high water, to prevent the western portion of the city from being submerged, and to make practicable the drainage and irrigation and cultivation for agricultural purposes of large tracts of land; and to those ends the company was empowered to construct and maintain all necessary dams, headgates, flumes, and other means which might be necessary to control, regulate, and distribute the

waters of the canal so diverted from the Jordan river. It is apparent that the diversion of water and its distribution for irrigation were intended, as well as the diversion of water from the Jordan river at times [265] of high water. Having the power to construct and use its canal for the purpose of irrigation as well as drainage, the Surplus Canal Company was authorized to enter into the contract with the North Point Irrigation Company dated December 9, 1886, in which it granted to the company the right to take water from its canal for irrigation and domestic purposes, and to construct dams and gates to divert water into the canal of the North Point Irrigation Company to that end. This contract in writing of December 9, 1886, referred to, ratified the verbal contract of February 27th of the same year with the unincorporated company. While the name of the North Point Canal Company is used in the written contract, there is no doubt from the evidence that the North Point Irrigation Company, who had succeeded to the property and rights of the unincorporated company, was intended, and we must hold that the contract was made with the incorporated company.

Defendants also insist that the execution of the contract of December 9, 1886, by the Surplus Water Company, was not proven by a preponderance of the evidence. While the evidence was conflicting, we are disposed to find that it was proven by a clear preponderance, and that it was executed by authority of both parties to it. It purports to be so signed. Two witnesses so state. It was acknowledged and delivered by the proper officers of the Surplus company, duly filed for record, and recorded. The North Point Irrigation Company on the faith of it built a new canal the distance of a mile, at considerable cost, thereby connecting their canal with the Surplus canal, constructed a headgate according to the terms of the contract, contributed to the building of the Surplus canal, and took out water under the contract, whenever desired, until this suit was brought. After the contract was so signed, acknowledged, [266] delivered, accepted, and acted upon by both parties, it would be a breach of faith for the defendants to avoid it now on the ground that it was not authorized and duly executed. After this contract or grant was so executed, acknowledged, delivered, and recorded, the Jordan & Salt Lake Surplus Water Canal Company transferred their canal to Salt Lake City and Salt Lake county, upon the condition that they would take the control and management of it for the uses and purposes for which it was constructed. It appears from the evidence in the record that the North Point

Irrigation Company acquired its right to take water from the Surplus canal before its waters were rendered unfit for irrigation by the impure surplus and seepage water discharged through the drain ditch into it from Decker's lake. But the canal company defendants claim that the seepage and surplus water from the lands irrigated by them flows naturally into White lake, a part of the Surplus canal. Undoubtedly, a proprietor of higher land is entitled to the benefit of the natural flow therefrom, onto the lands of another, of surface or other water not brought there by artificial means. But, when water is brought onto the higher land by artificial means, the proprietor is not entitled to such natural flow onto the land of another, to his injury. The proprietors of higher lands have not the right to the natural flow of water brought onto their lands by artificial means. If natural forces alone bring water onto a man's land, he may allow natural forces to take it off, though it may be deposited on the land of another, to his injury. Seepage from lands, caused by irrigation water brought in canals or other artificial ditches, cannot be regarded as natural seepage or drainage. It is not brought there alone by natural laws, as water from rain, snow, or springs is. Nor is the water in question conducted by gravitation, in drains or [207] depressions made by natural forces, into the Surplus canal. It appears that the seepage and surplus water complained of is conducted, in small, artificially constructed drains, into the chain of lakes, and some of those are connected by such artificial ditches until it reaches Decker's lake, and from that a drain ditch nearly two miles long, of considerable width and several feet deep—in one place as much as six feet—was made and is maintained by the defendants, through which the waters so collected in Decker's lake flow into the Surplus canal. The defendants have no right to conduct water through their canals onto lands irrigated by them, and then, by means of drain ditches, conduct the seepage and surplus water therefrom, rendered unfit for irrigation or domestic uses, into the Surplus canal, out of which the plaintiff has the right to take water for useful purposes: Butler v. Peck, 16 Ohio St. 335; 88 Am. Dec. 452; Gould on Waters, sec. 271; Livingston v. McDonald, 21 Iowa, 160; 89 Am. Dec. 563; Adams v. Walker, 34 Conn. 466; 91 Am. Dec. 742; 1 Wood on Nuisances, secs. 386, 387.

There is evidence that the waters of Decker's lake, before the drain ditch complained of was constructed, when the water was high, sometimes overflowed its rim, and found its way into the

Surplus canal. This, however, did not authorize the defendants to cut a drain ditch through the rim or intervening higher ground, and conduct such water as would not overflow into the Surplus canal. In Butler v. Peck, 16 Ohio St. 335, 88 Am. Dec. 452, the court said: "And it makes no difference that in times of high water a portion of the waters of the basin would overflow its rim, and find their way, along a natural swale, to and upon the lands of the plaintiff below; for, as to those waters which naturally could not surmount nor penetrate the rim of the basin, but were compelled to pass off by evaporation, or remain where they were, the case is the same as if the basin had [268] no outlet whatever." Section 2785 of the Compiled Laws of Utah of 1888 declares: "It shall be the duty of all persons using water from any natural source of supply, to provide suitable ditches for conveying surplus water again into the natural channel, or other place of use, to the satisfaction or approval of the water commissioner." It appears that the defendant canal companies divert water from the Jordan river into their canals, several miles above the point where the Surplus Canal Company connects with the same river (one of them as much as seventeen miles above), and that they have a number of drain ditches, at different points, carrying the surplus and seepage water back into the river, the natural source of supply; but, when they came down to the chain of ponds or lakes, they constructed their drain ditches into them, and from them into the Surplus canal, whose waters the plaintiff uses for irrigation. They should have carried the seepage and surplus water complained of back into the common source, the Jordan river, as they do further up the river, as the statute contemplates, or to Salt Lake. Either way appears practicable, from the evidence.

The canal companies, defendants, also claim a prescriptive right to drain the water complained of into the Surplus canal. The evidence proves that the defendants, the canal companies, first constructed their drain ditch in the spring of 1886, but enlarged and extended it as late as 1892. And it appears that the plaintiff used water from the Surplus canal to the last-named year, when it was found to be unfit for irrigation, culinary, or other domestic use. At that time plaintiff's officers and agents found it was so impure as to be altogether unfit for use. The drainage of pure water, or water suitable for irrigation or other uses to which the plaintiff wished to put it, into the Surplus canal, was not inconsistent with plaintiff's use of it [269] for the purpose of irrigation or other use. So long as the plaintiff

obtained water from the Surplus canal suitable for its purposes, it could make no difference whether it all came from the Jordan river, or other source. But as soon as seepage or surplus water was emptied into the canal, that rendered it unfit for use, then such drainage became inconsistent with plaintiff's use of the same canal for irrigation purposes, and the canal companies' use of it became exclusive. It has been held that adverse use of an easement will give title by prescription, when substantially the same, as to length of time, exclusiveness, acquiescence, and in other respects, as the adverse possession that will give title to real estate. If the adverse possession that will give title under the statute of limitations is required to be exclusive, continuous, and uninterrupted for seven, ten, or other number of years, under claim of right, with the knowledge and acquiescence of the owner, then the same facts must exist to give title in case of an easement. The statute of limitations as to real estate in force in the late territory and in this state at the time it is claimed that canal companies, defendants, gained the right by prescription to drain their seepage and surplus water into the Surplus canal, required the existence and concurrence of facts that do not exist with respect to the alleged easement relied upon in this case. This is apparent from an examination of sections 3136 and 3137 of the Compiled Laws of Utah of 1888. There is no analogy between the facts attending the alleged easement relied upon in this case, and the facts required to be shown in order to gain title under the statute of limitations.

The canal companies also rely upon section 2780 of the same compilation, which declares that: "A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, ... is hereby recognized [270] and acknowledged to have vested and accrued as a primary right to the extent of any reasonable necessity for such use thereof, under any of the following circumstances: 2. Whenever any person or persons shall have had the open, peaceable, uninterrupted, and continuous use of water for a period of seven years." The facts upon which the easement claimed by defendants must stand are not analogous to those giving the right to the use of water under the statute. The statute relates to the use of water for a useful purpose. The defendants claim a right to drain impure and befouled water into a canal whose waters are used for the purpose of drainage, irrigation, and domestic purposes. The right described by the statute is to take water for useful purposes. The right as described in the pleadings and evidence is to dis-

charge impure water, unfit for use, into a canal whose waters are used for irrigation, culinary, and other domestic purposes. The facts upon which the canal companies rely to establish a right by prescription are not analogous to those required by either of the statutes above referred to. And they can only be applied as to time when analogous in other respects: Harkness v. Woodmansee, 7 Utah, 227; 19 Am. & Eng. Ency. of Law, 1st ed., 11.

The discharge of impure and foul water into a canal whose waters are used for irrigation or other useful purpose creates a nuisance. It appears from the evidence in this case that the waters of the Surplus canal were rendered totally unfit for irrigation or domestic purposes by the seepage and surplus water from the land irrigated by defendants' canals, discharged through their drain ditch from Decker's lake. Section 3463 of the statutes (Compiled Laws of Utah of 1888) declares that: "Anything which is injurious to health, or indecent, or offensive to the [271] senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be abated or enjoined, as well as damages recovered." This section declares that anything which is injurious to health, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of property, is a nuisance. The mixing of alkali or mineral with water used for culinary or other domestic use, so that it cannot be used, is certainly offensive to the taste, injurious to health, and interferes with the enjoyment of life. And to befoul water used for irrigation, so that it kills vegetation, is an obstruction to the free use of property, and interferes with its enjoyment. A nuisance may be offensive to the sense of smell, sight, or hearing. In the prosecution of a business, offensive odors may be cast off, unusual and offensive noises may be given out, fluid substances may escape into a neighbor's well, or one may do or cause to be done that which is offensive to the eye. In either case it may become a nuisance. Or the thing done or maintained may be injurious to property, and affect the free use of it, and in that way be a nuisance: Wood on Nuisances, secs. 115, 116; Crane v. Winsor, 2 Utah, 248; Black's Pomeroy on Water Rights, sec. 76.

The use that will give a prescriptive right to maintain a pri-

vate nuisance must be adverse, under a claim of right, uninterrupted, and continuous, for twenty years, with the knowledge and acquiescence of the party whose right is invaded: Campbell v. Seaman, 63 N. Y. 568; 20 Am. Rep. 567; 1 Wood on Limitations of Actions, 1st ed., sec. 182; Totel v. Bonnefoy, 123 Ill. 653; 5 Am. St. Rep. 570.

[272] The general rule is, that there can be no prescriptive right to maintain a public nuisance. Time will not sanctify it: Ashbrook v. Commonwealth, 1 Bush, 139; 89 Am. Dec. 616; Wright v. Moore, 38 Ala. 593; 82 Am. Dec. 731.

It appears from the evidence in the record that plaintiff's canal was designed to irrigate various tracts of land owned by different persons, and that a number of them irrigated their lands from the canal for a time, and that stock drank of its waters. The further question is, Did the canal companies create a public nuisance by draining the seepage and surplus water from the lands irrigated by them into the Surplus canal, in that way contaminating its waters with salt and other substances, thus rendering it unfit for use? The statute (Compiled Laws of Utah of 1888, sec. 4566) declares that: "A public nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: 1. Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons; 4. In any way renders three or more persons insecure in life, or the use of property." It appears that various persons were prevented from cultivating or using their property, and the water upon which they relied to some extent for watering stock and for domestic purposes was made unfit for these purposes. It is true that considerable evidence was introduced on the trial tending to show that much of the land situated so that it could be irrigated from plaintiff's canal is impregnated with alkali and salt, and unfit for agricultural purposes. But the evidence establishes the fact that crops grew on some of it prior to 1892, when irrigated with water from the plaintiff's canal, received through the Surplus canal, from the Jordan river, before the drain ditch from Decker's lake was enlarged; and we think the inference that a [273] great portion of the land that could be leached and irrigated from plaintiff's canal would eventually become fit for cultivation if irrigated alone with water from the Jordan river, or with water through the Surplus canal, without being mixed with the water from the drain ditch from Decker's lake. There was also evidence tending to prove that the waters of White lake, through which the Surplus canal runs, contain a

large per cent of salt; that its waters are unfit for irrigation. That lake is not large, and from the evidence we are of the opinion that a portion of the waters of the Jordan river, running through it, would purify and render it fit for irrigation, when not contaminated with the seepage and surplus water from the lands irrigated by the canals of the defendants, and by waters of the chain of lakes discharged through the drain ditch from Decker's lake.

The defendants finally urge that the findings of the court below should not be disregarded or set aside, and the decree based thereon reversed, unless it appears that they, or some one or more of them, are so essentially and palpably erroneous as to induce a belief that such findings were induced by a mistake, or that the court was misled in some essential respect with respect to them. This appeal was taken on questions of fact as well as of law, and this court has recently held that in equity cases we may go behind the findings, and weigh all the evidence, and decide according to its preponderance. But when the evidence as to a fact found to exist or not to exist is so evenly balanced, or the proof of it is so unsatisfactory, as to cause the mind to hesitate and pause as to the side on which it preponderates, or as to its existence or nonexistence, and to leave it in grave doubt, we are of the opinion the finding of the court below should remain. In 274 the case of Whittaker v. Ferguson, 16 Utah, 240, this court said: "An appeal may be taken in equity cases on questions of fact as well as of law. The appellate court, therefore, by necessary implication, has the same jurisdiction and power in equity cases to determine questions of fact as of law, and may go behind the findings and decree of the trial court, consider all the evidence, decide on which side the preponderance thereof is, ascertain whether or not the proof justifies the findings and decree, and modify or set aside the findings and decree, and enter or direct such findings as the evidence, in the judgment of the appellate tribunal, may justify." We hold that the court below erred in its findings, so far as they conflict with this opinion, and in granting the decree entered upon them. The decree appealed from is reversed, and the cause is remanded, with directions to the court below to set aside its findings so far as they conflict with this opinion, and to make additional findings in conformity with it, and to enter a decree perpetually enjoining the three canal companies named as defendants from draining the seepage or surplus water from the lands irrigated from their canals, or any or either of them, or the waters of the chain of

lakes mentioned in the pleadings, through the drain ditch from Decker's lake, also mentioned in the pleadings, or otherwise, into the Salt Lake Surplus Water canal, or into White lake, a part of it, and ordering them to fill up said drain ditch, and ordering a writ of injunction to the same effect, against each of the defendants. Costs are awarded to the plaintiff against the defendants.

Miner, J., and Johnson, district judge, concur.

CORPORATIONS—GENERAL LAW AS PART OF CHARTER. The provisions of a general law under which a corporation is formed or organized, to exercise ordinary corporate powers, enter into and form a part of its charter: People v. Chicago etc. Trust Co., 130 Ill. 268; 17 Am. St. Rep. 319.

A CORPORATION POSSESSES ONLY SUCH POWERS as are expressly given it by law, and such implied powers as are necessary to enable it to exercise the express powers thus given: Franklin Nat. Bank v. Whitehead, 149 Ind. 560; 63 Am. St. Rep. 302.

WATERS—PERCOLATION OR SEEPAGE—POLLUTION.—No one has a right to pollute water flowing through his land so as to render it unfit to be used by the landowner below for domestic purposes: Note to People v. Elk River etc. Lumber Co., 48 Am. St. Rep. 124; McCallum v. Germantown Water Co., 54 Pa. St. 40; 93 Am. Dec. 656; Richmond Mfg. Co. v. Atlantic De Laine Co., 10 R. I. 106; 14 Am. Rep. 658. An owner cannot, by artificial means, discharge upon another's land percolating water which has collected upon his premises: Note to Parker v. Larsen, 21 Am. St. Rep. 32. Any artificial use which deprives a lower proprietor of the beneficial use of water to which he is entitled is unlawful: Note to Helfrich v. Catonsville Water Co., 28 Am. St. Rep. 249. Waters composed partly of seepage water escaping through a levee by percolation and partly of rainfall are subject to the rules in regard to surface waters: Gray v. McWilliams, 98 Cal. 157; 35 Am. St. Rep. 163. A landowner may be enjoined from causing filthy and contaminated water to percolate from his soil into adjacent lands, to the injury of his neighbor: Barrett v. Mt. Greenwood Cemetery Assn., 159 Ill. 385; 50 Am. St. Rep. 168.

EASEMENTS BY ADVERSE USER—WATERS.—The acquisition of an easement by adverse use follows the analogy of the acquisition of title by adverse possession. The enjoyment must be adverse, under a claim of right, with the knowledge, and contrary to the interests, of the owner, and it must have continued in that manner for the period fixed by the statute: Note to Pitzman v. Boyce, 33 Am. St. Rep. 543. And these facts must exist to establish a prescriptive right to use water in a certain manner: Note to Swan v. Munch, 60 Am. St. Rep. 495; Alcorn v. Sadler, 71 Miss. 634; 42 Am. St. Rep. 484. The right to the use of water, in a particular manner, is acquired by the uninterrupted adverse enjoyment of such use for over twenty years: Note to Smith v. Youmans, 65 Am. St. Rep. 34; but a prescriptive right to render running water unfit for drinking or domestic purposes requires the strictest proof of its existence: McCallum v. Germantown Water Co., 54 Pa. St. 40; 93 Am. Dec. 656.

NUISANCE—IMPAIRING PURITY OF WATER.—Any use of water which defiles or corrupts it to such a degree as to essentially impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied

is an infringement of the right of other owners of land through which the watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy: Note to People v. Elk River etc. Co., 48 Am. St. Rep. 124.

PUBLIC NUISANCE.—THERE IS NO RIGHT, prescriptive or otherwise, to maintain a public nuisance. Time cannot legalize it: Mills v. Hall, 9 Wend. 315; 24 Am. Dec. 160; note to Mississippi Mills Co. v. Smith, 30 Am. St. Rep. 557.

THOMPSON *v.* SALT LAKE RAPID TRANSIT COMPANY.

[16 UTAH, 281.]

RAILROADS—STREET RAILWAYS—DUTY AND CARE.—A street-car company, as well as a person traveling upon a public street, is bound to exercise such ordinary care, prudence, and precaution to avoid injury as the surrounding circumstances may require.

RAILROADS—STREET RAILWAYS—DANGEROUS PROPELLING POWER—CARE REQUIRED.—The duty of a street-car company to recognize the rights of persons in the lawful use of the streets is imperative, and if it adopts a propelling power, such as electricity, which increases the hazards of such persons, it must be held to a degree of care proportionate to the increase of danger.

RAILROADS—STREET RAILWAYS—APPLIANCES—DUTY—NEGLIGENCE.—It is the duty of a street-car company to have the usual appliances required for starting, stopping, and controlling its cars, when propelled by electricity, for, without these appliances to control and manage them, they become dangerous. It is, therefore, gross negligence for the company to put an electric-car upon a track in a public street, and allow it to run without such appliances.

RAILROADS—DEFECTIVE APPLIANCES—NEGLIGENCE.—If a street-car company has repeated notice of defective brakes, and a defective motor, on one of its electric-cars, but fails to remedy the defects, and the motorman, in running the car, sees a person approaching the track, with the evident intention of crossing, without looking up or seeing the car, and makes a strenuous effort to stop it by applying the brakes, which are so defective that they do not work, and he receives a shock from the defective motor, which delays his purpose for a second, so that he cannot stop the car until such person is struck and fatally injured, because of the defective brakes, a clear case of negligence on the part of the defendant company, in not providing proper appliances, is presented, especially where the car runs over fifty feet past the place of the accident before it is stopped, but could have been stopped, when the first effort was made, within eight feet, had it been in repair like other cars.

RAILROADS—STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—If a deaf and dumb, but well grown, boy, a little over fourteen years of age, having good eyesight, and possessed of average intelligence, attempts to cross a street railway track, while a car is passing, the question of his contributory negligence is properly submitted to the jury.

NEGLIGENCE—RULE WHERE BOTH PARTIES ARE NEGLIGENT.—If both parties are negligent, the true rule is, that the party who last has a clear opportunity to avoid an accident, not-

withstanding the negligence of his opponent, is considered solely responsible for it.

NEGLIGENCE—RECOVERY IN THE FACE OF CONTRIBUTORY NEGLIGENCE.—A plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury to him.

NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.—The question as to whose negligence was the direct and proximate cause of an accident is one of fact for the jury.

RAILROADS—STREET RAILWAYS—DEFECTIVE APPLIANCES—LIABILITY FOR INJURY.—If a street-car company knowingly places in operation upon a public street a defective electric-car, which cannot be controlled because the brakes and appliances provided for it are out of repair, and injury is occasioned by reason of such defective brakes and appliances, the jury may properly find that the company's negligence was the proximate cause of the injury, though the injured party was negligent, if the motorman was unable to avoid the latter's contributory negligence.

RAILROADS—STREET RAILWAYS—DEFENDANT CANNOT PLEAD ITS OWN NEGLIGENCE AS A DEFENSE.—In an action against a street railway company for negligence causing death, it should not be allowed to excuse its own negligence and want of reasonable care, and thus avoid liability, by showing that prior to, and at the time of, the accident, it had knowingly been negligent in not keeping its car and appliances in order and repair, and that, on account of such negligence, it was unable to prevent the injury complained of, at the time, by the use of ordinary care.

Action by Joseph M. Thompson against the defendant company, to recover damages for negligently causing the death of the plaintiff's son. The complaint charged that the defendant negligently and carelessly failed to have its cars supplied with suitable brakes, switches, and motors; and that, by reason thereof, and the negligent and careless operation of its car, it was driven over the plaintiff's son, a deaf and dumb boy, between fourteen and fifteen years of age, who died from the effects of the injuries received. The boy started to go across the defendant's track, in Salt Lake City, without looking up or apparently seeing a car which was approaching. The motorman rang the bell three or four times, and, finding that it did not attract the boy's attention, he attempted to stop the car, but failed, and the car struck the boy, who died from the effect of his injuries. The car passed on about fifty-eight feet beyond where the boy was struck before it was stopped. The deceased had no defect except that he was deaf and dumb. He was a well-grown boy, a little over the average size, and equaled the average of intelligence and quickness of comprehension as compared with children in the full possession of their faculties. He knew of the exist-

ence of street-cars and lines. The motorman testified that he saw the boy coming when about twenty feet from the track; that he put his foot on the gong, and turned off the power, intending to reverse the car; that when he turned off the power, he had one hand on the brake, and received a shock from the motor that disabled him for a second; that the hind brake of the car was loose, and kicked off; that the brakes on the car were not in good condition; that the car had been disabled in a collision in March before the accident, after which it could not be controlled by the brakes; that shocks from the brakes were frequent; that when he turned off the power, he intended to reverse but for the shock he received; that the car had been out of repair for a considerable length of time before the accident, which fact the witness had reported to the proper officer of the defendant company every time he had used it for weeks prior to the accident; that the brakes would not stop the car; that he applied the brakes as soon as he saw that the boy was likely to cross the track, and did all he could to warn the boy and stop the car, but could not stop it in time to save him; that the boy did not look up toward the car, but looked straight ahead; and that, if the car had been in repair, like other cars, he thought he could have stopped it, by reversing, in about eight feet. Other witnesses testified that the motor was out of repair; that the axles were sprung; that the brakes would not work; and that motormen were frequently shocked by electricity from the motor. Reports of this kind were frequently made by motormen to the night inspector before the accident. Some testimony was offered by the company, which tended to show that the car and brakes were in good condition when the accident occurred. There was a judgment for the plaintiff, and the defendant appealed.

Williams, Van Cott & Sutherland, for the appellant.

Richards & Richards, for the respondent.

287 MINER, J. The court submitted the question of the negligence of the defendant, the contributory negligence of the deceased, in connection with his age, capacity, and condition under the circumstances, and the condition of the car, to the jury. The court instructed the jury, among other things, that "even though you believed the son of the plaintiff was guilty of contributory negligence by crossing the track without observing whether or not the cars were running thereon and in operation,

or by any other act, and that, if he had been free from such contributory negligence, the injury would not have occurred, yet if the motorman, after the act of contributory negligence complained of, had the opportunity, or could, by the use of reasonable care, had the brakes and motor of the car been in proper condition, have avoided the accident, then the act of said motorman, which is the act of defendant company, was the proximate cause of the injury complained of by the plaintiff." "If you believe from the evidence that the defendant company exercised due care and caution in operating the car at the time of the accident, and that the accident was not in any way the result of any defect in the appliances for controlling the car, then the defendant would not be liable." Exceptions were taken to these instructions. Appellant's counsel contend that conceding the fact that the defendant was negligent in sending out a defective car, and that the deceased was also negligent in crossing the track in front of the car, in such a case it was the only duty of the defendant, after discovering the dangerous situation of the deceased, caused by his own negligence, to exercise all reasonable care and diligence at his command at the time of the injury, and that when the motorman did all he could to stop the car, although its brakes were defective, the defendant could not be held [288] liable, even if the car had been sent out in a defective condition with the defendant's knowledge; that as nothing could be done by the motorman after the discovery of the boy's negligence to remedy the defective condition of the car, all that he was required to do was to use the defective appliances which he had to stop the car; that if the deceased was guilty of contributory negligence, the unsafe and defective condition of the car, although known to the defendant, was not the proximate cause of the injury. The result of such a doctrine would be that under such circumstances, when the defendant discovered negligence in a plaintiff, he could legally excuse the exercise of his own want of reasonable care, by showing that its appliances and brakes were in such a wretched condition at the time, on account of its previous and continued negligence, that it was incapacitated from preventing the injury complained of at the time by the use of reasonable care. This position of the able counsel for the defendant is not only ingenious, but is apparently supported by some authority bearing upon the general question of contributory negligence; but we cannot subscribe to such a doctrine when applied to the operation and management of electric-cars upon the streets in a city where the lives and safety of pedestrians are

largely dependent upon the safe equipment and perfect condition of the appliances with which a street-car is propelled, operated, and controlled. If such a doctrine should be established, it would practically place the exclusive right to the use of the street occupied by the street-car company in such company, to the exclusion of the citizen. If the citizen used the street, he would do so at the peril of his own safety. If such rules were applicable to contributory negligence, his safety in crossing a street where streetcars were operated, with its right to recover damages [289] in case of negligence, would largely depend upon the option of the company to keep its appliances in good repair. In case of his injury by its negligence, the fact of such negligence on the part of the company would be a bar to his recovery in case he contributed to the accident, which the company could, by the use of reasonable care, have avoided.

Persons traveling upon a public street, and crossing street-car tracks, are not held to the same degree of care as when crossing a steam railroad track. This is so because in the one case the street-car can or should be in such a condition as to be brought readily under control, and because the public have a right to travel upon all of the public streets, while such rights do not usually exist with reference to steam railroad tracks. When the streets were originally platted, they were not designed for street railways, but were confined to the right of public travel, with equal rights to all persons traveling thereon. The right conferred upon a street railway is not superior to that of the public at large, except the right to lay its tracks and operate its cars, which must be done with as little inconvenience as possible to the public travel. The right conferred includes no exclusive right to use the track or street. Neither has the citizen the exclusive right to the use of the street or track. The cars have the right of way in case of meeting vehicles or persons on the track, but each party is bound to exercise such ordinary care, prudence, and precaution to avoid injury as the surrounding circumstances may require. That which might be ordinary care in running horse-cars might be gross negligence in operating street-cars propelled by electricity or running at a high rate of speed. The electric car is propelled by a force that cannot be easily controlled [290] except by such appliances as are expressly provided for that purpose. Without these appliances to control it, it becomes dangerous. Neglect to provide these safeguards for its control and man-

agement is negligence. "The duty of the company to recognize the rights of persons in the lawful use of the streets is imperative, and, if it adopts a propelling power which increases the hazards of such persons, it must be held to a degree of care proportionate to the increase of danger because of such propelling power. This is so because, the more dangerous the appliance, the more likely it is for casualties to happen; and, consequently, the greater the degree of care which must necessarily be exercised in order to avoid their occurrence." When the defendant placed its cars upon the track for service, the deceased had a right to expect that the usual appliances required for starting, stopping, and controlling the cars were provided. Knowingly placing an electric-car upon a track in a public street, and allowing it to run without such appliances for its control, is not only gross negligence, but it may amount to criminal negligence in case of injury to one without his fault.

In the case at bar, the motorman saw the deceased when he was about twenty feet from the track. He rang the bell, and as the deceased approached the track, with the evident intention of crossing without looking up or seeing the car, he applied the brakes, and intended to reverse the car; but the handle of the brake was so out of repair that he received an electric shock from the motor that disabled him for a second, and delayed his purpose. The brakes were out of repair, and would not work, and he could not stop the car with the appliances furnished until the injury was done; and, with all his efforts to stop the car, it ran about fifty feet after it struck the boy before he could stop it. Notice of the defective condition of the car had [291] been given the defendant company many times prior to the injury, but the defect had not been remedied. The testimony shows that, had the car been in repair like other cars, the motorman could have stopped it by reversing it in about eight feet. These facts undoubtedly present a clear case of negligence on the part of the defendant company. If the motorman had not received the shock from the motor, he could have reversed and stopped the car. If the brakes had been in order, he might have stopped the car, and prevented the injury.

The testimony also shows that the deceased was deaf and dumb, but a well-grown boy, a little over fourteen years of age, and possessed of at least average intelligence and quickness of comprehension. He was acquainted with street-cars. His eyesight was good. He was of sufficient age and intelligence to understand the dangers that surrounded him in that locality,

and, on account of the defect he was laboring under, was more bound to use the sight he possessed for his own safety. The question of his contributory negligence was properly submitted to the jury. 2 Shearman and Redfield on Negligence, sec. 481. Both parties being negligent, the true rule is held to be that "the party who last has a clear opportunity to avoid the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it": 1 Shearman and Redfield on Negligence, sec. 99. It is also well settled that a plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury to him: 1 Shearman and Redfield on Negligence, sec. 99. Under such circumstances, the obligation rested upon the defendant to exercise reasonable care to avoid the consequences of 292
the deceased's negligence; and the question as to whose negligence was the direct and proximate cause of the accident was one of fact for the jury to determine, under all the facts and circumstances of the case. The question was properly submitted for their determination, and they found against the defendant. Under the circumstances shown, it was clearly the duty of the defendant to have had the car supplied with sufficient brakes, motors, and appliances, with which it could be controlled. The motorman should have been furnished with sufficient means and suitable appliances with which to slow down and stop the car immediately on the first appearance of danger. Allowing the appliances adopted and in use for the purpose of controlling the car to become out of repair and useless for that purpose, and the inability of the motorman to stop the car for that reason, were doubtless, as the jury found, the proximate cause of the accident. The defendant should not be allowed to excuse its own negligence and want of reasonable care in such cases, and avoid liability, by showing that prior to and at the time of the accident he had knowingly been negligent in keeping his car and appliances in order and repair, and that on account of such negligence he was unable to prevent the injury complained of at the time by the use of ordinary care. If the defendant knowingly placed in operation upon the public street a defective car, that could not be controlled because the appliances provided for that purpose were out of repair, and the injury complained of was occasioned by such defective brakes and

appliances, and the motorman was unable to avoid the effect of the contributory negligence of the deceased, because of such defects, then it would probably be said that the defendant's negligence was the proximate cause of the injury. In the case of Penny v. Rochester etc. R. R. Co., 7 N. Y. App. Div. 595, 40 N. Y. Supp. 172, it [293] appears that a box of sand was usually provided for use upon the car, but was not provided for use at the time of the accident. The court held the following instruction proper: "If the jury find that, by using the sand at the time this accident happened, the car might have been stopped in a shorter space than it was, it was a question for them to say whether it was not negligence on the part of the defendant that there was no sand on the car to use." We are of the opinion that the court committed no error in its instructions to the jury: Hall v. Ogden City etc. R. R. Co., 13 Utah, 243; 57 Am. St. Rep. 726; Penny v. Rochester R. R. Co., 7 N. Y. App. Div. 595; 40 N. Y. Supp. 172; 1 Shearman and Redfield on Negligence, secs. 481-483; 2 Shearman and Redfield on Negligence, secs. 481-483; Booth on Street Railway Law, sec. 305; Dederichs v. Salt Lake City R. R. Co., 13 Utah, 34. We are also satisfied that there was evidence to support the verdict. We find no reversible error in the record.

The judgment of the district court is affirmed.

Zane, C, J., and Bartch, J., concur.

RAILROADS — STREET RAILWAYS — DANGEROUS PROPELLING POWER.—If a street railway company adopts a propelling power such as electricity, which increases the danger to the public, it must be held to a degree of care proportionate to such increase of danger: Hall v. Ogden City St. Ry. Co., 13 Utah, 243; 57 Am. St. Rep. 726.

NEGLIGENCE—QUESTION FOR JURY.—If the facts are in dispute, or if different conclusions may be drawn therefrom, the question of negligence is for the jury; otherwise, it is for the court: Watson v. Portland etc. Ry. Co., 91 Me. 584; 64 Am. St. Rep. 268.

NEGLIGENCE IN INJURING NEGLIGENT PERSON.—There can be no recovery for damages caused by negligence to which the person injured contributed, but where the negligent act which caused the injury is done after the negligence of the injured party is known to the other party, and the injury might have been avoided by the exercise of reasonable care on his part, there is an exception to the general rule, and the contributory negligence of the injured party will not defeat a recovery: Keefe v. Chicago etc. Ry. Co., 92 Iowa, 182; 54 Am. St. Rep. 542; Hall v. Ogden City St. Ry. Co., 13 Utah, 243; 57 Am. St. Rep. 726.

NEGLIGENCE IN INJURING NEGLIGENT PERSON—PROXIMATE CAUSE.—The question, in such cases, as to whose negligence was the proximate cause of the injury is one of fact for the jury to determine under the circumstances of each particular case: Hall

v. Ogden City St. Ry. Co., 13 Utah, 243; 57 Am. St. Rep. 726; monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 851, on proximate and remote cause.

BROWN v. MARKLAND.

[16 UTAH, 360.]

EVIDENCE—ADMISSIBILITY OF WRITTEN INSTRUMENT AS PART OF CONTRACT.—If parties, at the time of entering into a written contract, expressly strike out of it an instrument, which has not been perfected or executed, and which is understood to be no part of the contract, it is not afterward admissible in evidence as constituting a part of the contract.

EVIDENCE, PAROL—WHEN ADMISSIBLE TO INTERPRET CONTRACT.—Whenever the terms of a contract are susceptible of more than one interpretation, or a latent ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract, and to determine the object on which it was designed to operate.

CONTRACTS—RIGHT OF ACTION, WHEN MADE FOR A THIRD PERSON'S BENEFIT.—If a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon, at the instance and in the name of the party to be benefited, although the promise or contract was made without his knowledge, and without any consideration moving from him. This principle applies to the sale of a mine, where the purchaser assumes, and agrees to pay, the claim of a third person against it.

APPEAL—HARMLESS ERROR—REVERSAL OF JUDGMENT.—The erroneous admission of immaterial evidence is no ground for reversal, where the rights of the appellant were not prejudiced by the error.

Action by Mary E. Brown against Charles B. Markland on a contract. There was a judgment for the plaintiff, and the defendant appealed.

Bennett, Harkness, Howatt, and Bradley & Richards, for the appellant.

Brown & Henderson, for the respondent.

361 BARTCH, J. This is an action upon a contract, which, the plaintiff claims, was made for the benefit of herself and others, although she was not a party thereto. It appears that on April 30, 1894, William A. Frailey and associates, owners of a mine, entered into a written contract with the defendant, whereby, for a certain consideration, they agreed to convey their mine to him free of encumbrance, except a mortgage lien, and certain claims of persons for labor performed and materials furnished at the mine, which mortgage and claims, it is con-

tended, the defendant assumed and agreed to pay. The plaintiff maintains she was one of these claimants, and, at the trial, the jury returned a verdict in her favor for the amount of her claim, and the court entered judgment thereon. This appeal is from the judgment.

Counsel for the appellant insist that Exhibit A, an instrument which the appellant drew up, but which was never signed by the parties to the transaction, constituted a part of the contract of sale, and that the court erred in excluding it from the evidence. Respecting Exhibit A, the witness Richard Gundry, one of the owners of the mine, testified that Markland drew it up; that it was never perfected or executed; and that Exhibit 1, the contract read to the jury, was the only agreement between the grantors and grantee. Another witness testified that [362] the owners at the time of winding up the transaction objected to the exhibit in dispute; that it was not a part of the agreement, and was not to be considered so; and that Markland, in the presence of the witness, said: "We'll strike this Exhibit A out. We don't care anything about it." On cross-examination, as a witness in his own behalf, Markland himself said: "Exhibit A was stricken out." From this, and other testimony in the record, it is apparent that the exhibit in question constituted no part of the contract, and was properly ejected.

The next question to be determined is, What were the rights of the respondent under the contract of sale? By the terms of that instrument, the owners bound themselves to convey the property to Markland "free and clear of all liens, claims, clouds, and encumbrances whatsoever, except a certain mortgage for about three thousand seven hundred dollars, and interest thereon, given on said property, ... and except for the claims of persons who have performed labor upon or furnished materials for use in or on said property, and which outstanding claims do not exceed in the aggregate the sum of two thousand five hundred dollars," the conveyance to be made and delivered on or before May 10, 1894. The mortgage indebtedness and claims Markland assumed and agreed to pay, as stipulated in the writing signed by him and the owners. The deed executed and delivered in pursuance of the agreement bears date May 7, 1894. There is no question that the amount of all the claims, including the respondent's, is less than two thousand five hundred dollars. At the trial the court permitted evidence to be introduced to show what the intentions of the parties to the transaction were, at the time of the making of the contract

of sale, respecting the assumption of the payment of respondent's claim by the appellant. This was objected to as incompetent, on the ground that it was sought thereby to contradict the [363] terms of a written agreement. Under the circumstances of this case, we do not think the objection well taken. One of the issues was whether respondent's claim was one to be paid by virtue of the written contract. It had appeared in evidence that she had furnished money and supplies for the amount of her claim to the owners of the mine, with which to operate it. The contract does not appear to be very specific and certain as to such a claim. It might have been intended to be included within its terms and it might not. Just what the intention of the parties respecting it was by using the expression, "claims of persons who have performed labor upon or furnished material for us in or on said property," must depend upon the surrounding circumstances. In the light of what was said and done at the time of a transaction, of the conduct of the parties thereafter, and of the interpretation which they themselves have placed upon it, a court is more likely to arrive at the real meaning and intent of the parties when the terms employed in an instrument are indefinite or ambiguous. Such evidence is not received to vary the language of the writing, but to explain what was meant by its use. It serves to explain the subject matter, and enables the court to determine what the instrument referred to and embraced. Its object is to elucidate the meaning of the parties. Therefore, in this case, for the purpose of showing the intended meaning of the expression here under consideration, and to ascertain whether or not the contracting parties intended, by making use of that language, to include the respondent's claim, as a part of the debt to be assumed, parol evidence of what was said and done by them respecting the claim, at the time of the execution of the agreement, was admissible. Where the terms employed in a written instrument are clear and unequivocal, [364] import what the legal obligation is, and are not uncertain as to the object and intent of the contract, parol evidence is not admissible to controvert them; but whenever the terms are susceptible of more than one interpretation, or a latent ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract, and to determine the object on which it was designed to operate. In Browne on Parol Evidence, section 54, the author says: "The conversations and

acts of the parties to a contract, at and about the time of the making of the contract, as well as subsequent to the making of the contract, are admissible in evidence to show what sense the parties attached to any term or phrase used in the contract, which is in itself susceptible of more than one interpretation, or which, viewed in the light of the evidence explanatory of the subject matter, the relations of the parties, and the circumstances, may reasonably be susceptible of more than one interpretation": See, also, Browne on Parol Evidence, secs. 53, 55; 1 Greenleaf on Evidence, sec. 277; 2 Wharton on Evidence, sec. 940; Bartels v. Brain, 13 Utah, 162; Swett v. Shumway, 102 Mass. 365; 3 Am. Rep. 471; Hart v. Hammett, 18 Vt. 127; Barrett v. Stow, 15 Ill. 423; Noyes v. Canfield, 27 Vt. 79; Goodrich v. Stevens, 5 Lans. 230; Stoops v. Smith, 100 Mass. 63; 97 Am. Dec. 76; 1 Am. Rep. 85; Field v. Munson, 47 N. Y. 221; Bradley v. Washington etc. Steam Packet Co., 13 Pet. 89; Reed v. Insurance Co., 95 U. S. 23.

In the case at bar, the witness Richard Gundry, one of the grantors, testified that at the time of the transaction the respondent, Mrs. Brown, had a claim of about three hundred and eighty dollars against the mine; that at that time the grantee was informed by him that she was one of the claimants; and also that her claim was a part of the debt against the mine. The witness Frailey, another of the grantors, testified, [365] it appears without objection, that it was a part of the agreement that Markland should pay and settle Mrs. Brown's claim. Mrs. Brown testified, in part, concerning what was said between her and Markland, in April, 1894, as follows: "I said to him: 'I am perfectly willing to transfer this account to you if you will assume the debt.' He said: 'I can't do anything until I see the owners, but when I have seen the owners I will let you know.' After he had made arrangements—I don't know what arrangements—with the owners, he came back to me next morning and said hurriedly: 'I have made satisfactory arrangements with the owners. I assume your bill, and I will pay it with interest.'" The witness also testified that he said he would pay it "in sixty days." The appellant testified concerning a conversation with Mrs. Brown, respecting payment, in the latter part of April, 1894, as follows: "She asked me about that claim of hers, and I said, if things keep looking as they are now [because they had struck what seemed to be a body of galena ore in the mine] that it wouldn't be sixty days." The witness further stated that, in a conversation with Mrs. Brown,

he told her the first money he got out of the mine he "would pay toward applying on those claims out there." This, and other evidence of a similar character, was admissible, in accordance with the principle above stated, and is quite sufficient to convince the mind that the terms employed in the agreement by the contracting parties were designed by them to include the respondent's claim. The contract thus made, for a valuable consideration, inured to her benefit, and the grantee of the premises became the promisor. She thereafter had a right to look to him for payment of her claim, under the rule that "where a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon 366 at the instance and in the name of the party to be benefitted, although the promise or contract was made without his knowledge, and without any consideration moving from him": Montgomery v. Rief, 15 Utah, 495; Thompson v. Cheesman, 15 Utah, 43; Clark v. Fisk, 9 Utah, 94; 1 Parsons on Contracts, 467.

It is also insisted that the court erred in permitting the witness Thomas to testify to a conversation he said he had with the appellant, concerning a claim the witness had against the mine. This evidence was clearly immaterial, and ought to have been excluded; but, under the circumstances of this case, we do not regard its admission as reversible error. It did not prejudice the rights of the appellant, if the respondent was entitled to recover, and we think she was, by reason of the contract between the appellant and the owners of the mine. We are also of the opinion that the instructions of the court, under the facts of this case, although subject to criticism, were not prejudicial to the appellant. We find no reversible error in the record.

The judgment is affirmed.

Zane, C. J., and Miner, J., concur.

EVIDENCE, PAROL—CONTRACTS.—Parol evidence is admissible to explain a writing; to make its terms definite; to fill out an incomplete contract; to apply the terms of a writing to the subject matter; to show the circumstances under which a contract was made; or to show whether a paper ever became a contract or not: See monographic note to Harris v. Murphy, 56 Am. St. Rep. 661, on subsequent parol agreement to vary a writing.

CONTRACT FOR BENEFIT OF THIRD PERSON—ACTION.—A person for whose benefit an express promise is made in a valid contract between others may maintain an action thereon in his own name: Note to St. Louis v. Von Phul, 54 Am. St. Rep. 703.

APPEAL.—HARMLESS ERROR is no ground for reversal of judgment: Osborne v. Francis, 38 W. Va. 312; 45 Am. St. Rep. 859; Farwell Co. v. Wolf, 96 Wis. 10; 65 Am. St. Rep. 22; Rockford City Ry. Co. v. Blake, 173 Ill. 354; 64 Am. St. Rep. 122.

HAGUE *v.* NEPHI IRRIGATION COMPANY.

[16 UTAH, 421.]

WATERS—ACTION—SUFFICIENCY OF COMPLAINT.—The allegations of a complaint, in a suit brought to determine the plaintiff's right to the use of water from a stream, are sufficient to withstand a general demurrer, where ownership, invasion of right, and injury are clearly and distinctly alleged, for a cause of action is stated, at least in general terms, although there is no distinct allegation as to how the plaintiff became the owner of the water right, whether by appropriation, adverse user or purchase. His title may be shown, by proof, under such general allegations.

WATERS—APPROPRIATION—TESTS. — Appropriation of water does not mean merely the diverting of it, but includes its use for some beneficial purpose. The appropriation, intention of the appropriator, use, and beneficial purpose, are the tests which determine the rights acquired by the diversion of a stream.

WATERS—APPROPRIATION — RESTRICTIONS. — Whatever may be the quantity of water diverted from a stream, the extent of the appropriation is limited to the quantity necessary for the purposes for which the appropriation is made, and the intention to apply it to some useful purpose, without unnecessary delay, must also appear, in order to confer upon the appropriator a vested right thereto.

WATERS—APPROPRIATION—EXCESS.—If more water is diverted from a stream than is necessary to satisfy the useful object or purpose of the appropriation, there is no vested right in such excess, and it may be taken by a subsequent appropriator for a useful purpose.

WATERS—APPROPRIATION—EXCESS.—If persons divert the waters of a stream, for domestic purposes and irrigation, in larger quantities than is necessary for the uses intended, the excess may be appropriated by the owner of a mill for manufacturing purposes, or so much thereof as may be necessary for his use.

WATERS—DIVERSION—RIGHT TO CHANGE PLACE OF. One who is entitled to the use of water flowing in a stream, and who has diverted it, may change the place of diversion, if such change causes no injury to the rights of others previously acquired; but it is otherwise when the rights of a subsequent appropriator are injuriously affected by the change.

WATERS—DIVERSION—RIGHT TO CHANGE PLACE OF. If a prior appropriator of water in a stream, and a subsequent appropriator, are each entitled to a certain portion of the stream, neither can change the place of diversion so as to injuriously affect the rights of the other.

APPEAL—THE FAILURE TO MAKE A FINDING on an issue is not reversible error if, under the facts and circumstances disclosed by the evidence, it would necessarily have been prejudicial to the appellant, and the facts found are sufficient to sustain the decree.

APPEAL—COMPETENCY OF EVIDENCE IN EQUITY CASES.—If there is ample proof in the record, unassailed, to justify

the findings and decree, in an equity case, the appellate court will not determine the competency of evidence which could not have affected the decree.

Suit by John Hague against the Nephi Irrigation Company. The controversy was over the use of the water of Salt creek, in the town of Nephi. The plaintiff claimed a right to use a certain portion of such water for manufacturing purposes, and the defendant a right to divert a part of such portion for the purposes of irrigation before its subjection to the plaintiff's use. The town of Nephi was settled, in 1851, by nineteen families, and, in 1852, the water of Salt creek was diverted from its natural channel for culinary, domestic, and agricultural purposes. In the year last named, the plaintiff's predecessor in interest built a gristmill, locating it on the stream above all the points where water had been diverted; but in 1853, on account of trouble with the Indians, the mill was moved into the town, and located on a ditch. The mill was reconstructed in 1854, and a right of way to carry water to the mill was obtained from the town. About the year 1860, the millrace was moved from the ditch and connected with the stream. The mill and its race afterward remained in this location. The plaintiff, in 1862, became the owner of the mill property and its appurtenances by purchase. When he became its owner, two ditches for irrigation and culinary purposes had been taken out above the mill, but the water to supply it was permitted to flow down the stream, and, after passing through it, was diverted and used for the purpose of irrigating a large body of land. The plaintiff reconstructed the mill in 1862, but made no particular change in the race, which afterward remained the same. No controversy arose over the plaintiff's right to the use of water for his manufacturing purposes until the defendant began to divert it, five or six years before this suit was brought, so as to prevent it from flowing through the mill. At this time the defendant not only refused to permit the plaintiff to use the water to which he claimed to be entitled, but asserted the right to change the place of use, and to divert such water above the mill whenever it chose to do so, although the effects of such change and diversion would be to prevent the operation of the mill to the plaintiff's injury. At no time since 1862, and until the defendant began to divert the water, was there more than one-third of the water of the stream diverted above the mill, and there was always, during such period, except during the months of July, August, and September of each year, more water than was necessary to run

the mill. After the commission of the acts of diversion complained of, more land was irrigated from ditches taken out above the mill than was irrigated from the same sources before. The plaintiff therefore brought suit to have his right to the use of the water ascertained and determined, to have his title thereto quieted, and to have the defendant and its agents restrained from diverting away from his mill any portion of the water to which he might be entitled. A demurrer to the complaint was overruled, and a decree rendered granting to the plaintiff the relief asked. The defendant appealed.

Moyle, Zane & Costigan and F. W. Chappell, for the appellant.

Thurman & Wedgewood, for the respondent.

426 BARTCH, J. It is insisted by the appellant, at the outset, that the complaint fails to state a cause of action, and that its demurrer, by which this point was raised, ought to have 427 been sustained. The objection seems to be that it does not plead the acquisition of any right in the stream, on the part of the plaintiff, either by appropriation or by adverse user. It is alleged, in effect, that for a period of more than thirty years prior to the commencement of this action the plaintiff, his grantors and predecessors in interest, operated and were the owners of a gristmill, located in Nephi, on Salt creek, and during such period were the owners of a sufficient water right in the stream to operate it; that they had the free and uninterrupted use of the water during that period, except the interference therewith by the defendant since 1894; that during 1894, and since, the defendant wrongfully and unlawfully diverted water from the mill which was necessary to operate it, causing injury to the plaintiff; and that it threatens to continue to do so. Ownership, invasion of right, and injury are clearly and distinctly alleged, and a cause of action is stated, at least in general terms, although there is no distinct allegation as to how the plaintiff became the owner of the water right—whether by appropriation, adverse user, or purchase. Under the general allegations, this could be shown by proof. If the defendant desired a more specific and definite allegation of ownership, showing the nature thereof, its remedy was by proper pleading. Having failed in this, it cannot now be heard to complain: Mangum v. Mining Co., 15 Utah, 535. We are of the opinion that the allegations of the complaint are sufficient to withstand a general demurrer.

Counsel for the appellant next insists that the findings and decree are "wholly wrong in basing the plaintiff's rights upon his adverse use of the water," there being no evidence showing such use. This assumption that the plaintiff's rights are based on adverse user is warranted neither by the pleadings nor by the findings and decree. [428] In his complaint his rights are based upon ownership since about 1852, the time Nephi was settled and the first mill erected. From the findings of fact it appears that, by certain conveyances, executed to him by persons owning a right to use of water of Salt creek for milling purposes, and by actual appropriation and use thereof, the plaintiff became the owner of the right to use a portion of the waters of that stream, and ever since has been the owner thereof, and used the same to operate his gristmill, and so used it until interrupted by the acts of the defendant, of which he complains. The decree on this point is in harmony with the findings. Thus plaintiff's right is evidently based upon appropriation, purchase, and use.

But it is contended that all the water of Salt creek was appropriated for irrigation, domestic, and culinary purposes by the first settlers of Nephi, in 1852, before the first mill was built, and from this it is argued that there was no water flowing in the stream which was subject to appropriation by the owners of the mill, and that consequently their use of the water was simply permissive, and ripened into no right which the owner could enforce in law. It may be that the nineteen families, who, in 1851 or 1852, first settled the town of Nephi, in beginning to reduce a few arid acres of land to a state of cultivation and productiveness, appropriated, as stated by some of the witnesses, or attempted to do so, for agricultural, domestic, and culinary purposes, all the waters of Salt creek, a stream which has since been found to be amply sufficient to supply a town of considerable population—hundreds of families—for the same purposes, and, in addition thereto, to irrigate large bodies of arid lands. Possibly, with the limited knowledge of irrigation in those days, those few people, in an attempt to irrigate their lands turned all the water [429] of the stream out of its natural channel, and thought they appropriated it; but, even if such be the fact, it does not necessarily follow that it was all "appropriated," within the legal sense of the term. Appropriation of water does not mean merely the diverting of it, but includes its use for some beneficial purpose. The appropriation, intention of the appropriator, use, and beneficial purpose are the tests

which determine the rights acquired by the diversion of a stream. This is so under the statutes, and the use may be for domestic purposes, irrigating lands, propelling machinery, and the like; that is, the water may be applied to any useful purpose: Compiled Laws of Utah of 1888, sec. 2780 (14 Stats. 253).

The object and intention, under the law, in diverting water, must be to apply it to some useful purpose, and, if, by means of ditches, more is diverted than is necessary for such purpose, the excess cannot be regarded as a diversion for a useful purpose; for, as a matter of fact, such excess merely runs to waste, and its diversion cannot result in a vested right. If, therefore, A, who owns and intends to irrigate but one acre of land, diverts all the water of a natural stream, which is sufficient to irrigate two acres, he obtains a right only to sufficient water to irrigate his one acre, and B, who also owns an acre, may appropriate the excess. If, in this arid region, the law were otherwise, it would be a menace to the best interests of the state as well as to its citizens, because it would enable a few individuals, or association of individuals, by diversion of water in excess of use, to greatly limit the area of the public domain which could be cultivated, and thus deprive the state of its revenue and citizens of homes within its borders. This is exemplified in the case at bar, where nineteen families settled upon public lands, and are now represented as then having, in cultivating a comparatively [430] few acres of land, diverted all the water of the stream, which was then and is now sufficient to irrigate thousands of acres, and to supply the inhabitants of the city of Nephi with water for culinary and domestic purposes. No such extravagance in the use of water was ever intended by the enactment of the laws relating to the appropriation and use of water in the arid belt of the country. The extent of the appropriation is limited, no matter how much water may have been diverted, to the quantity necessary for the purposes for which the appropriation is made, and the intention to apply it to some useful purpose, without unnecessary delay, must also appear, in order to confer upon the appropriator a vested right thereto. If there is no intention, on the part of the appropriator, to apply the water to such purpose, within a reasonable time, there is no valid appropriation, and the water remains subject to appropriation by others. So, where there is more diverted than is necessary for the object of the appropriation, there can be no intention to apply the excess to a useful purpose, and such excess remains subject to appropriation. In

Kinney on Irrigation, sec. 150, it is said: "This intention goes to the very foundation of the act of appropriation, and must be evidenced by a constancy, or steadfastness of purpose or labor, as is usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs." In Ortman v. Dixon, 13 Cal. 34, it was said: "The measure of the right, as to extent, follows the nature of the appropriation or the uses for which it is taken. The intent to take and appropriate and the outward act go together. If we concede that a man has right by mere priority to take as much water from a running stream as he chooses, to be applied to such purposes as he pleases, the question still arises, what did he choose to take? And this depends upon the general and particular uses he makes of it. If, [431] for instance, a man takes up water to irrigate his meadow at certain seasons, the act of appropriation, the means used to carry out the purpose, and the use made of the water should qualify his right of appropriation to a taking for a specific purpose, and limit the quantity to that purpose, or to so much as necessary for it." So, in Nevada etc. Canal Co. v. Kidd, 37 Cal. 282, Mr. Chief Justice Sawyer, after reference to a number of cases, observed: "The doctrine is, that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others. Anybody else may divert and use all the water, be it more or less, that a prior claimant is not in a present condition to use, and, by lack of diligence on his part in pursuing and perfecting a prior inchoate right, many acquire rights even superior to his": Kinney on Irrigation, secs. 151, 153; McKinney v. Smith, 21 Cal. 374; Combs v. Agricultural Ditch Co., 17 Colo. 146; 31 Am. St. Rep. 275; Maeris v. Bicknell, 7 Cal. 262; 68 Am. Dec. 257; Nevada Water Co. v. Powell, 34 Cal. 110; 91 Am. Dec. 685; Simpson v. Williams, 18 Nev. 432.

The principles thus referred to apply with much force to the case at bar, where it is manifest from the testimony that if the first settlers diverted all the water of Salt creek, they diverted vastly more than was necessary for the uses intended, and therefore the respondent and his predecessors in interest had a right to appropriate, for the purposes of the mill, what was not applied to some useful purpose by the settlers, within a reasonable time after their diversion. If they only appropriated a portion of the stream, which seems to be the case indicated by the cir-

cumstances disclosed in the record, then the owners of the mill could appropriate the remainder, or so much [432] thereof as was necessary for the use intended by them. In either event their appropriation was lawful. From these considerations, and in view of the testimony in the record, it is quite clear that the findings and decree of the trial court are substantially correct, being fair and proper deductions from the evidence.

It is also insisted that the mill was built subject to the right of the appellant to change its place of diversion. This is conceded by counsel for the respondent as to the quantity of water which had been appropriated above the mill, and used by the appellant and its predecessors in interest, prior to the appropriation for mill purposes by the owners, and we do not see that this concession can injuriously affect the rights of the respondent, because he does not claim that the water to which he is entitled for his manufacturing purposes had been appropriated and used by the appellant, and then returned to the stream, but that the appellant had no right to divert it above the mill, and never did appropriate it, except below the mill, after it had answered his purpose. Where a prior appropriator of water merely changes the place of diversion without causing injury to a subsequent appropriator, the subsequent appropriator has no cause of complaint. It may be otherwise, however, when the subsequent appropriator is injuriously affected by the change. In the case at bar, the appellant cannot change the place of diversion of water, which it appropriated subsequently to the location and erection of the mill, in such a manner as to prevent the water, to which the respondent is entitled, from flowing through his mill. The appellant and the respondent are each entitled to the use of a certain portion of the stream, and neither can change the place of diversion so as to injuriously affect the rights of the other. The law, however, is well settled that one who is entitled to the use [433] of water flowing in a stream may change the place of diversion, if such change causes no injury to the rights of others previously acquired. In Kinney on Irrigation, sec. 154, the author says: "When water has been lawfully appropriated, the priority thereby acquired is not lost by changing the use for which it was first appropriated and applied, or the place at which it was first employed, provided, that the alterations made from time to time shall not be injurious to the rights acquired by others prior to the change." In Butte etc. Mountain Co. v. Morgan, 19 Cal. 609, it was held that, where a person appropriated and diverted water of a stream at a cer-

tain point, he could not afterward change the place of diversion to the prejudice of the rights of a subsequent appropriator. The court said: "The rule is that the change must not injuriously affect the rights of others." In Junkans v. Bergin, 67 Cal. 267, it was observed: "Undoubtedly, one entitled to divert a quantity of water from a stream may take the same at any point on the stream and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change." So, in Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, it was said: "The rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his": Black's Pomeroy on Water Rights, sec. 69; Fuller v. Swan River etc. Min. Co., 12 Colo. 12; Kidd v. Laird, 15 Cal. 162; 76 Am. Dec. 472; Ramelli v. Irish, 96 Cal. 214; Lobdell v. Simpson, 2 Nev. 274; 90 Am. Dec. 537; Columbia Min. Co. v. Holter, 1 Mont. 296. The cases of Fuller v. Swan River etc. Min. Co., 12 Colo. 12, Kidd v. Laird, 15 Cal. 162; 76 Am. Dec. 472, and Ramelli v. Irish, 96 Cal. 214, [434] were cited by counsel for the appellant in support of their contention here under consideration.

Upon examination, however, it will be found that they all support the doctrine above stated, that one who is entitled to the use of water of a stream may change the place of diversion if the rights of subsequent appropriators are not affected by the change. Counsel for the appellant also cited the case of Last Chance Min. Co. v. Bunker Hill etc. Co. 49 Fed. Rep. 430, and maintain that it illustrates the proposition that "where water is used for domestic and irrigation purposes, the place of diversion can always be changed." That portion of the opinion quoted in their brief and on which they rely as illustrating their position, appears to be simply dictum. The portion which is authoritative is covered by the syllabus, which is by the court, as follows: "The appropriator of water, to be used at a specified place for the purpose of operating machinery and other works, after so using it and returning it to its original channel, cannot change the place of use to the damage of a subsequent appropriator lower down on the stream." The proposition of the appellant in the case at bar, that it has the right to change the

place of diversion, must therefore be limited to instances where the change does not injuriously affect the rights of respondent.

It is further contended for the appellant that an affirmative issue of equitable estoppel was set up in the answer, and that the failure of the court to find upon such issue was error. If it were conceded that such an issue was contained in the pleadings, still the failure to make a finding thereon would not be reversible error because such finding, under the facts and circumstances disclosed by the evidence, would necessarily have been prejudicial to the appellant, and the facts found are sufficient to sustain [435] the decree: Maynard v. Locomotive Engineers' etc. Assn., 16 Utah, 145, ante, p. 602; Groome v. Ogden City Corporation, 10 Utah, 54.

The appellant also complains of the admission of certain oral evidence relating to the grant of a right of way to convey water to the mill in 1854 to a municipal record, and to ownership of a mill by repute. Inasmuch, however, as there is ample proof in the record, unassailed, to support and justify the findings and decree, and as this was a cause in equity, we do not regard it important to determine the competency of the evidence to which the objection refers.

It is further urged in behalf of the appellant that the findings respecting the quantity of water to which the respondent is entitled during the several periods of the year are not justified by the proof, and that such quantity was decreed to him without any basis therefor in the evidence. It appears in the testimony that the declination of the millrace or flume has not been changed since 1862; that the size of the flume is the same as it was before; that it required about fifteen or sixteen inches in depth of water, running in the flume, to operate the mill at its full capacity; and that during the winter months the mill was always run at its full capacity. There is also evidence showing the condition of the stream, and how the millrace was operated during the other seasons of the year; and, without further reference in detail, we are of the opinion that the findings are not subject to the objections thus interposed, in view of the fact that a provision is made for a division of the water between the parties, within a given time, after notice of the decree, and, in case they cannot agree, then for determining by measurement the quantity of water to which each party is entitled. We do not deem it important to discuss the other questions presented, al-

though they have not escaped our notice. We find no reversible error in the record.

The judgment is affirmed.

Zane, C. J., and Miner, J., concur.

WATERS—APPROPRIATION.—A mere diversion of water from a stream does not constitute an appropriation. To make it such there must be an application of the water to a beneficial use: Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513; 55 Am. St. Rep. 149. The amount of an appropriation of water is, in every instance, limited to the uses for which it was made, and restricted to the quantity needed for the purpose: Nevada Ditch Co. v. Bennett, 30 Or. 59; 60 Am. St. Rep. 777, and monographic note thereto showing what constitutes an appropriation of water, and that waters not used are subject to appropriation by another. A prior appropriator of water may change the point of diversion at pleasure, if he does not thereby injure the rights of others: Note to Wimer v. Simmons, 50 Am. St. Rep. 700.

APPEAL.—A FAILURE TO MAKE FINDINGS OF FACT on material issues is not reversible error, where, if found, they must necessarily have been adverse to the appellant, and when those already found were sufficient to support the judgment: Maynard v. Locomotive etc. Ins. Assn., 16 Utah, 145, ante, p. 602.

APPEAL.—ERROR WITHOUT PREJUDICE is no ground for a reversal of judgment: Note to Plymouth County Bank v. Gilman, 46 Am. St. Rep. 791.

HAMNER *v.* BALLANTYNE.

[16 UTAH, 436.]

JUSTICE OF THE PEACE—APPEAL—JURISDICTION AFTER ADDITION OF NEW PARTIES AND DISMISSAL AS TO OTHERS.—If a justice's court has jurisdiction of the parties to a case before it, and of its subject matter, an appeal from the justice's court to a district court gives the appellate court jurisdiction of both. Hence, if new parties defendant are added on such appeal, and they entered an appearance, a dismissal, in the district court, as to the only party defendant in the justice's court, does not deprive the district court of jurisdiction of the case, or of the parties brought in.

EXECUTION AGAINST INDIVIDUAL PARTNER, WHEN VOID.—An execution upon a judgment against a firm, so far as it purports to be against the individual property of its members, is absolutely void, though it will protect the officer who, in good faith, executes it.

EXECUTION—WRONGFUL LEVY OF EXECUTION AGAINST INDIVIDUAL PARTNER—LIABILITY.—A plaintiff who, in person, or by his attorney, causes to be issued and delivered to an officer, an execution against the property of an individual member of a firm, when the judgment is against the firm by name, and there is no judgment against the individuals composing the firm, is guilty of a trespass or tort, and is answerable for the consequences of the unlawful act.

EVIDENCE—ACTION FOR WRONGFUL LEVY OF EXECUTION AGAINST INDIVIDUAL PARTNER.—In an action by

a member of a firm against one for the wrongful levy of an execution against his individual property, it is competent for the plaintiff to offer, in evidence, the judgment-roll, in the action against the firm, for the purpose of proving that the judgment upon which the execution was founded was against the firm and not against him.

Action by Hamner against Ballantyne, instituted before a justice of the peace. On appeal to the district court a new party, B. K. Bloch & Co., a corporation, was added, by way of amendment, as a party defendant, and the action was there dismissed as to Ballantyne, upon the plaintiff's motion. The judgment referred to in the opinion was obtained by B. K. Bloch & Co. There was a judgment for the plaintiff, and the defendant appealed.

John W. Judd, for the appellant.

G. F. Boreman and Evans & Rogers, for the respondent.

437 ZANE, C. J. It appears from the evidence in this record that the defendant obtained a judgment in the district court against the firm of Blackburn & Co. for three hundred and sixty-six dollars and twenty-eight cents; that an execution issued thereon, reciting a judgment against the individual members of the partnership, of which the plaintiff was one, as well as against the company by its firm name; that Thomas H. Ballantyne, a deputy United States marshal, by virtue thereof, seized and levied upon the two hundred and forty-two dollars and eighty-five cents in dispute, the individual property of the plaintiff Hamner, and paid it to the attorney of the defendant B. K. Bloch; that the plaintiff instituted this action against the officer for trespass before a justice of the peace, who rendered judgment against him for the amount so seized; that upon appeal to the district court a similar judgment was rendered by it, and upon appeal to this court it was reversed and remanded, because the writ was against the plaintiff as well as the company, and was fair on its face, and therefore protected him from damages in consequence of the wrong. It further appears that the complaint was amended by the plaintiff, by leave of the district court, before another trial, by making B. K. Bloch & Co., the plaintiff in the first suit, defendant, and afterward on the trial the suit was dismissed, on motion of the plaintiff, as to Ballantyne, and thereupon B. K. Bloch & Co., by their counsel, entered a motion to dismiss the suit upon the ground that the voluntary dismissal as to the only defendant in the justice's court deprived the court of jurisdiction to try the case. Counsel for the defendant con-

cedes that the district court had authority to grant the amendment, and admits the new defendant voluntarily appeared, but insists that the jurisdiction of the district court depended upon the jurisdiction of the justice. This position would have been correct had there [438] been a want of jurisdiction of the subject matter of the suit in the justice's court. When the subject matter of the suit is not within the jurisdiction of the justice, it is not within the jurisdiction of the district court on appeal. The appellate court gets jurisdiction by appeal, and, if the justice could have no jurisdiction of the subject matter, none could be given to the district court by the appeal. Undoubtedly, the justice would have had jurisdiction of B. K. Bloch & Co., had the company been made defendant, and, as the justice's court would have had jurisdiction in that case, the appellate court had jurisdiction when the company was brought in by the amendment, and appearance was entered. The trial of the cause upon the appeal was but a continuation of the litigation commenced in the lower court. The justice's court had jurisdiction of the parties to the case before it, and of its subject matter, and the appeal gave the appellate court jurisdiction of both and it acquired jurisdiction of B. K. Bloch & Co., by the amendment and appearance, and the dismissal of the suit as against Ballantyne did not deprive it of jurisdiction of the case or of the party brought in.

With respect to another point raised, the plaintiff, Hamner, and two other individuals were associated together and doing business by the common name of Blackburn & Co., and the defendant B. K. Bloch & Co. sued them by that name, and by that name obtained judgment against the firm. But the execution purported to be upon a judgment against the individuals composing the firm as well. The firm had a legal existence, and a name by which it was capable of doing business and of being sued and to that extent it had, in law, a separate and distinct existence from natural persons. In law there were four persons; the one was artificial, and with a more limited capacity. Section 3191 of the Compiled Laws of Utah of 1888, subjects [439] to suit and judgment such artificial person, but the judgment binds only the joint property of the natural persons associated together under the common name: Levally v. Ellis, 13 Iowa, 544; Davidson v. Knox, 67 Cal. 143.

The execution upon the judgment against the firm, so far as it purported to be against the individual property of its members, was absolutely void; but it protected the officer who, in good faith, executed it, but not the plaintiff who, in person or by his

attorney, caused it to be issued and delivered to him. The levy did not pass the legal title to the money seized to the officer. He could not have held it had suit been brought against him while it was in his hands, without showing a judgment against the person whose individual property it was. But the writ, being against the owner, though void, so far as it could give any right to the money seized, its command executed in good faith excused the trespass or wrong or tort, as termed in law, as to the officer, and protected him from the consequences of the injury to the owner of the property, and from damages to the owner resulting from that injury. But the command of the writ did not protect B. K. Bloch & Co., or their attorney, for wrongfully causing the writ to issue, and for placing it in the hands of the officer, and in that way causing the plaintiff's money to be seized, and for wrongfully taking the proceeds of such levy. They did not act under the writ, and it could not protect them for the part they took in the trespass or tort. The law required them to know the judgment was not against the owner of the money, the plaintiff in this case, and therefore it could not shield them from the consequences of the unlawful act: Day v. Bach, 87 N. Y. 56; 9 Bacon's Abridgement, 494; Kerr v. Mount, 28 N. Y. 659; Foster v. Wiley, 27 Mich. 244; 15 Am. Rep. 185; Thomas v. Hinsdale, 78 Ill. 259; Cooley on Torts, 2d ed., 148.

[440] On the trial of this case the plaintiff offered in evidence the judgment-roll in the case of B. K. Bloch & Co. against Blackburn & Co., showing a complaint and judgment against the firm only and an execution thereon against the plaintiff and the other two members of the firm as well as against the firm, and a return on the execution showing the levy on the money in question as the property of the plaintiff and the payment of it to the attorney of B. K. Bloch & Co. The defendant objected to its introduction on the ground that it was incompetent, irrelevant, and immaterial. It was sufficiently authenticated, and it showed that the judgment was against the firm, not against the plaintiff; an execution against the defendant, who was not a party to the judgment, a seizure of his money, and the payment of it to the attorney of the defendant in this case. It was clearly competent, relevant and material, and we are of the opinion that the court did not err in overruling defendant's objection to it.

The judgment is affirmed, with costs.

Bartch and Miner, JJ., concur.

EXECUTIONS—PARTNERSHIP.—As to the effect of a levy, and execution sale of a partner's property under a writ against the firm, see note to McCulloh v. Dashiell, 18 Am. Dec. 283.

EXECUTIONS—ACTION FOR WRONGFUL USE OF.—The plaintiff in an execution is answerable to the defendant for enforcing an irregular execution: Commonwealth v. O'Cull, 7 J. J. Marsh. 149; 23 Am. Dec. 393; but he is not liable for a tort of the officer in levying a valid writ unless he ratifies and adopts such tort, in which case he is jointly answerable with the officer: Murray v. Mace, 41 Neb. 60; 43 Am. St. Rep. 664.

CASES

IN THE

SUPREME COURT

OF

VERMONT.

STATE *v.* TAYLOR.

[70 VERMONT, 1.]

ARREST WITHOUT WARRANT OF A FUGITIVE FROM ANOTHER STATE.—If one charged with the commission of a felony in one state escapes to another, he may there be arrested without warrant and detained before a demand for his return has been made by the governor of the state whence he fled.

WHEN AN ARREST IS MADE WITHOUT WARRANT of a person accused of the commission of a felony in another state, it is sufficient, in justification of the arresting officer, to show that he had reasonable cause to believe that the person arrested had committed a felony in the other state.

ARREST—DUTY OF ARRESTING OFFICER TO DISCLOSE HIS AUTHORITY.—It is sufficient for the arresting officer to state to the person sought to be arrested that he arrests him by authority of the state. It is not essential that the officer show his warrant or state the grounds of his arrest before making it, but, after it is made he should, if requested, state such grounds or show such warrant.

ARREST—RESISTANCE BECAUSE PAPERS ARE NOT SHOWN AND A REVOLVER IS EXHIBITED.—Where an officer informs persons of his purpose to arrest them by authority of the state, and, on demand being made for his papers he exhibits a revolver, stating that is sufficient, and then returns it to his pocket, the case being one in which he is entitled to arrest without a warrant, the parties sought to be arrested are not justified in resisting, and if, in doing so, they kill one of the arresting party, there is nothing in these circumstances to reduce the killing to manslaughter.

ASSAULT WITH INTENT TO COMMIT MURDER—INSTRUCTIONS TO JURY ON A TRIAL FOR.—If persons are on trial accused of an assault to commit murder, such assault having been made in attempting to resist a lawful arrest, the jury should be instructed that, before they return a verdict of guilty, they should be convinced from the evidence of an actual intent on the part of the accused to take life.

CRIMINAL LAW—ACTS OF ONE OF SEVERAL PERSONS ENGAGED IN RESISTING AN ARREST.—Where several persons are on trial for an assault to commit murder, all having been concerned in resisting an arrest, but one only of them doing the act which, had it resulted in the death of a human being, might have sustained a conviction for murder, the others cannot be convicted, if, on their part, they had no intent to resist the arrest to the extent of taking life.

OFFICIAL CHARACTER—HOW MAY BE PROVED.—The testimony of a witness that he was constable of R., and was acting as such at the time of his attempting to make an arrest, is competent. It is not necessary to prove his official character by the record.

ARREST—EVIDENCE IN JUSTIFICATION OF.—When persons are on trial for an assault to commit murder made in resisting an arrest, it is proper to receive the testimony of witnesses to show information given the officer before the attempted arrest, and, further, that a felony had in fact been committed, and that the persons attempted to be arrested were fleeing from the scene of the crime soon after its commission.

CRIMINAL LAW—EVIDENCE.—On the trial of persons accused of an assault to commit murder in resisting an arrest, it is proper to receive evidence tending to prove that one of them, near the close of the affray, ran off and hid, that he was afterward discovered and brought back, was found to be wounded, and when the physicians who dressed his wounds inquired his name, age, and place of residence, he remained silent.

W. E. Johnson and Butler & Moloney, for the respondents.

J. C. Enright, state's attorney, and W. W. Stickney, for the state.

[3] MUNSON, J. The alleged assault was committed upon Paul Tinkham, constable of Rochester, and three persons acting under him, while they were effecting an arrest of the respondents and two others, without a warrant, on suspicion of felony. The officer acted upon information received from Brandon by telephone, to the effect that the postoffice at Ticonderoga, New York, had been burglarized the night before, and that four persons suspected of the crime had left Forestdale going in the direction of Rochester. When met by the officer and his assistants, the suspected party were coming along the highway in a wagon driven by a liveryman from Forestdale. The jury have found under the charge of the court that when Tinkham met the respondents' party he said to them that he arrested them by the authority of the state of Vermont, and that upon inquiry being made as to which was the officer, Tinkham was designated as such by one of his party. The remainder of the transaction must be taken to have been in accordance with the testimony most favorable to the respondents' claim. The purport of this was, that one of the respondents' party then asked Tinkham if

he had any papers, and that Tinkham thereupon pulled a revolver from his pocket, saying that was all the papers he needed, at once returning the revolver to his pocket, and that respondent Taylor then said with an oath, "You can't take this party without papers," and that upon this all four of the suspected persons commenced to get out of the wagon, some of them firing at the constable's party as they did so.

The jury were instructed in substance that, if Tinkham had reasonable cause to suspect that the respondents had committed a burglary, he could arrest them without a warrant; and that if he told them that he arrested them by the authority of the state of Vermont, and if they knew he [4] was an officer, it was their duty to submit; and that if they shot the officer under these circumstances they were guilty of an assault with intent to murder. The respondents insist that the officer had no right to arrest without a warrant for a felony committed in another state; and that if he had that right, there was a failure to disclose his authority which justified their resistance; and that in any event the manner of the arrest was such that the grade of the offense should have been left to the determination of the jury.

It has long been held in most of the states that when one charged with the commission of a felony in one state escapes to another, he may be there arrested and detained before a demand for his return has been made by the governor of the state from which he has fled. In most of the cases where this doctrine has been enunciated, the arrest was made upon the warrant of a magistrate. But in State v. Anderson, 1 Hill (S. C.) 327, it was held that an arrest by a private person, without warrant, could be justified by showing prima facie that a felony had been committed in another state, and that the party arrested was the perpetrator. It is clearly the tenor of the decisions that the machinery provided for the arrest of local offenders is available for the arrest of fugitives from another jurisdiction; and it must follow that when the arrest without warrant is made by an officer, it will be sufficient for his justification if it appear that he had reasonable cause to believe that the person arrested had committed a felony in another state, although more than this may be required for his detention when brought before a magistrate. So, in In re Henry, 29 How. Pr. 185, it was said that the officers were undoubtedly authorized to arrest the prisoner upon reasonable ground of suspicion, although

there was no proof on the hearing that the suspicion was well founded.

It is well settled that the person whose arrest is attempted must have notice of the authority and purpose [5] of the person who undertakes to arrest him. The first case in which this matter is elaborately treated is that of Mackaley, reported in Cro. Jac. 279, and more fully in 9 Coke, 61. The arrest was in London, by a sergeant of the mace. The officer, having his mace at his back, but without showing it, clasped the prisoner about the body, saying, "I arrest you in the king's name" at the suit of such a person for such a debt, whereupon the officer was attacked and mortally wounded. The prisoner having been convicted of murder, the questions presented were considered by all the judges of England. It was argued that the arrest was illegal because made in the darkness of night, when the prisoner could not know the officer. To this the court said, "Although he cannot see the officer, yet when he hears him say, 'I arrest you in the king's name,' et cetera, he ought to obey him, and if the officer has not a lawful warrant he shall have his action of false imprisonment." It was further objected that the statement made by the officer at the moment of the arrest did not contain all the particulars held essential in Countess of Rutland's case, 6 Coke, 52; but it was said that the requirement in that case was to be applied when the party submits himself to the arrest, and not when he resists the officer and interrupts him before he can speak all his words. As to the necessity of producing the mace in connection with the words of arrest, it was said to be beyond question that the sergeant had not to show his mace, and that if an officer were required to show his mace it would be a warning for the party to fly. So upon the whole case it was unanimously held that, if an officer who hath execution of process be slain in doing his duty, it is murder in him who kills him, and that there need not be any inquiry of malice.

In Rex v. Woolmer, 1 Moody, 334, decided two centuries later, the judges went even further in sustaining a conviction, although not with entire unanimity. This case grew out of an arrest without warrant on information of [6] an attempt to rob. The arrest was made in the night by a watchman, dressed in a watchman's coat and carrying a lantern. The jury found that the prisoner knew him to be a watchman. All he said to the prisoner was, "You must go back and come along with me." He did not explain why, nor was any charge against the prisoner

stated. Here, it might be urged with some force that, in view of the failure to use any formal words of arrest, there should have been a statement of the charge for which the prisoner was wanted, in order that he might clearly understand that the watchman was acting in his official capacity. But it was resolved by nine of the thirteen judges who considered the case that "the watchman could legally arrest the prisoner without saying that he had a charge of robbery against him, though the prisoner had in fact done nothing to warrant the arrest; and that, had death ensued, it would have been murder. This case is ample authority to sustain the sufficiency of the words of arrest employed on this occasion, unless it be considered that a more explicit statement was required by the fact that inquiry was made regarding the possession of papers.

It is frequently said in the text-books and in judicial discussions that an officer must show his warrant or state the ground of the arrest, if demanded. But an examination of the authorities will show conclusively that this is not a part of the arrest, but a duty which immediately follows it. Upon submitting to the officer, the arrested party is entitled to this information, but he cannot put off the arrest and increase his chances of escape by requiring an explanation in advance. In Bellows v. Shannon, 2 Hill, 86, where it is said that either before or at the moment of the arrest the officer ought to say enough to show the party that he is not dealing with a trespasser, but with a minister of justice, it is further remarked, "I do not say that the officer is bound to declare the particulars of his authority before he makes the arrest, or that it may not sometimes be proper [7] to lay hands on the party before a word is spoken." In Commonwealth v. Cooley, 6 Gray, 350, where the respective duties of the officer and the arrested party are considered, it is said that the accused is required to submit to the arrest, to yield himself immediately and peaceably into the custody of the officer, and that the officer can have no opportunity to make the accused acquainted with the cause of his arrest until he has brought his prisoner into safe custody. Continuing, it is said: "These are obviously successive steps. They cannot all occur at the same instant of time. The explanation must follow the arrest; and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged."

It is evident from the adjudged cases that in the rule above stated, as to what is essential in making an arrest, notice of the officer's authority means notice of his official character and not

of the exact circumstances which authorize the arrest, and that notice of his purpose relates to the purpose to arrest and not to the purpose of the arrest. It is beyond question that in making an arrest by virtue of a warrant the officer cannot be required to show the warrant or state the substance of it until the arrest is accomplished. In this case there was no warrant, and the officer could arrest without one only in certain classes of cases. But we think the officer was no more obliged to state the conditions which authorized him to arrest without a warrant, than he would have been to produce his warrant or state the substance of it in case of an arrest on warrant. All that the respondents could require in the first instance was a statement sufficient to show that the person who demanded their submission was an officer acting in his official capacity. This was clearly covered by the designation of Tinkham as the officer, and by his statement that he arrested them by the authority of the state of Vermont.

It appears, then, that the words of arrest employed by the [8] officer were such as entitled him to an immediate submission to his authority, without answering the question regarding papers. But it is contended that the manner in which that question was answered, and the demonstration which accompanied the answer, were such as might have reduced the offense to manslaughter if death had resulted from the resistance made, and that consequently the jury should have been permitted to return a verdict of assault with intent to kill, even though the words of arrest were sufficient. The charge did not permit a consideration of the circumstances referred to in mitigation of the offense. It is doubtless true that an officer, declaring himself to be such, and having full authority to make the arrest, may conduct himself in such a manner as to lower the penalty of resistance. But when the case is void of evidence tending to show anything that could lawfully mitigate the assault made, it is not error to confine the jury to the graver offense: Boyd v. State, 17 Ga. 194; State v. Green, 66 Mo. 631. A majority of the court think there was nothing in this case that called for a submission of the question stated. The incident of the revolver had been preceded by a formal declaration of arrest, an inquiry as to which was the officer, the designation of Tinkham in response to this inquiry, and a further inquiry regarding the possession of papers. The revolver was shown by being drawn from the pocket, and was then immediately returned to the pocket. The act, as a whole, completely negatived any inten-

tion to use it unless its use was made necessary by resistance. We are aware that in such moments men sometimes act upon the preliminary threatening movement before the mind has taken cognizance of the concluding movement of opposite import, and that, in the consideration of such a question as the one presented, it will not do to rely too much upon a recital of events in the order of their initiation. But in this case the acts were connected with remarks which [9] determined their relation to each other with certainty. Tinkham's production of the revolver was accompanied by a statement that that was all the papers he needed. The shooting was preceded by a statement that the party could not be taken without papers. This remark, made prior to the shooting, in response to the statement which accompanied the exhibition of the revolver, separated the transactions, and characterized the act of resistance. When the evidence is considered together, it discloses nothing tending to show that the shooting was done under any misapprehension as to the officers' intention, or for any other purpose than to escape arrest.

It is also objected that the respondents could not be convicted of more than a common assault without the finding of an actual intent to take life, and that the charge permitted the jury to return their verdict without finding this. It has been repeatedly held in cases not involving the matter of arrest that proof of a specific intent to kill is requisite. The intent is the body of the aggravated offense. If death results from an unlawful act, the offender may be guilty of murder, even though he did not intend to take life; but if the assault, however, dangerous, is not fatal, the offender cannot be convicted of an assault with intent to kill unless the intent existed. An intent to take life may sometimes be presumed from the fact of killing, but when that fact does not exist the intent must be otherwise established. Any inference that may be drawn from the nature of the weapon and the manner of its use is an inference of fact to be drawn by the jury upon a consideration of these with the other circumstances of the case: 2 Bishop's Criminal Law, sec. 741; Roberts v. People, 19 Mich. 401; Patterson v. State, 85 Ga. 131; 21 Am. St. Rep. 152.

Nor do we find any ground for holding otherwise when the assault is made in resisting arrest. Under an indictment framed like this, a respondent may be convicted of an assault with intent to kill or an assault with intent to [10] murder: State v. Reed, 40 Vt. 603. The grade of the assault will depend upon whether

the crime would have been manslaughter or murder if death had ensued. But if the death had resulted from resisting an authorized arrest properly made, the crime would have been murder, regardless of the question of malice. So if the assault charged was committed in resisting such an arrest, and was found to have been made with intent to kill, it would have been an assault with intent to murder. But, in the case of either assault, there must have been the intent to take life. The elimination from the inquiry of malice as the distinguishing test between murder and manslaughter, and so between the two grades of assaults, does not eliminate the question of specific intent, which is an essential element even of the lower offense. The malice which the law infers from resistance to lawful arrest does not cover the intent to do a particular injury, and the question of intent must stand the same as in other cases.

So it becomes necessary to consider whether the matter of intent was properly submitted to the jury. The question was not entirely ignored by the court, but it was omitted from the general propositions submitted, and we think the charge as a whole could not fail to leave upon the minds of the jury an impression that, if the circumstances of the arrest were such that the killing of the officer would have been murder, the assault was an assault with intent to murder. The attention of the jury was directed almost exclusively to the question of guilt as depending upon the legality of the arrest. They were nowhere distinctly told that unless the respondents were found to have made the assault with an intent to take life they could be convicted of nothing but a common assault.

We think there was also error in the instruction given as to the liability of all for the act of one. The court charged in substance that if the four persons whom the officers were attempting to arrest were acting together with [11] a common purpose of resisting arrest, and any one of the four shot an officer in the execution of that design and with an intent to kill, and the other three were present assisting in the assault, all would be guilty of an assault with that intent. Assuming that the charge as a whole was sufficient to require the finding of an actual intent to take life on the part of one, it will be seen that the liability of the others for an assault with intent to take life is made to depend solely upon the illegality of the resistance. It is doubtless true that if all were combined for an unlawful resistance to the officers, and an officer had been killed by one of their number, all would have been guilty of the killing.

But no one was killed; and the liability of the actual assailant, other than for a simple assault, depended upon the existence of a specific intent to kill. We think the jury could not be permitted to return a verdict of guilty of an assault with intent to murder against all, on the mere finding of a common purpose to resist arrest. It would doubtless be different if it were found that they acted upon a common understanding that they would do whatever might be necessary to avoid arrest.

The testimony of Paul Tinkham that he was constable of Rochester, and was acting as such at the time of the arrest, was properly received. It was not necessary to prove his official character by the record: Commonwealth v. McCue, 16 Gray, 226.

The testimony of Hoyt and Martin, who assisted the constable in making the arrest, that they were called upon by Tinkham to help him arrest some burglars, was properly received. The requisition of the officer was their authorization, and it was proper to show what the officer called upon them to do.

Four men having been arrested, it was not error to permit the witness Harris, the United States marshal, to state that he had transferred two of them to another jurisdiction. [12] The statement contained nothing prejudicial to the respondents.

It being necessary for the state to show that the officer had reasonable cause to believe that the respondents had committed a felony, it was proper for the state to show by the witness Hall whatever was communicated by him to the officer as to the information the witness had received, and its source. But the state was at liberty to show that a felony had in fact been committed; and there was evidence, as to which no question is now made, concerning what had taken place in the postoffice at Ticonderoga. In this connection, and upon this ground, the entire testimony of Hall, and the testimony of Holbrook and Fletcher, were admissible as tending to trace and identify the respondents in their flight from the place of the burglary to the place of their arrest. Proof that a burglary had been committed, and that these men were fleeing from the scene of it immediately after its occurrence, bore upon the question whether they fully apprehended the character and purpose of the persons they assaulted, and the question whether they had a motive to fire upon them with intent to kill: People v. Pool, 27 Cal. 572.

The state was permitted to show that near the close of the affray the respondent O'Donald ran off and hid in the bushes, and that he was afterward brought in by two of the officer's assistants, and that when the physician came to dress his wounds

and inquired as to his name, age, and residence, he remained silent. The first was admissible as an incident in the affray, the second as an incident of the general transaction of which the affray was a part, and the third—in the view of a majority—as subsequent conduct indicative of guilt. The alleged offense was one which involved the respondent's connection with a prior transaction. The question put to him was such as might properly be asked by a physician when called to attend a stranger. The respondent's failure to give his name and [13] residence upon such an inquiry was evidence of a purpose to conceal his identity.

Exceptions sustained, sentence vacated, and cause remanded.

Start and Thompson, JJ., dissent on the points announced as majority holdings.

ARREST WITHOUT WARRANT.—The authority of a constable, sheriff, or other peace officer to arrest without process, upon reasonable suspicion, one who is charged with the commission of a felony, and to retain him for a reasonable time until a warrant can be procured, is well established: Note to Burk v. Howly, 57 Am. St. Rep. 614. An officer arresting a supposed felon without a warrant must act in good faith, and upon grounds of probable suspicion that the person arrested is an actual felon: Eanes v. State, 6 Humph. 53; 44 Am. Dec. 289, and extended note. An officer making an arrest with a warrant should give some notification of his authority as such officer: See monographic note to Hawkins v. Commonwealth, 61 Am. Dec. 158.

ASSAULT WITH INTENT TO KILL—ESSENTIALS OF CRIME.—To constitute the offense of an assault with intent to commit murder, a specific intent upon the part of the accused to take life is necessary, and must be established to the full satisfaction of the jury: Note to Patterson v. State, 21 Am. St. Rep. 155. Without a felonious intent there can be no felony: State v. Clayton, 100 Mo. 516; 18 Am. St. Rep. 565; but intent, like malice, may be either express or implied, and presumed where facts authorizing such presumption are proved: Hall v. State, 9 Fla. 203; 76 Am. Dec. 617. See Maher v. People, 10 Mich. 212; 81 Am. Dec. 781.

WILLARD v. WING.

[70 VERMONT, 123.]

COTENANCY.—If the owner of a farm leases it, with certain cows and other personal property thereon, under an agreement that, after paying expenses and taxes, each should be entitled to one-half of the income and profits, the lessor and lessee are tenants in common of milk produced from such cows.

GARNISHMENT OF DEBT DUE TO TWO OR MORE JOINTLY cannot be affected under a writ against one of them only.

E. A. Sowles, for the claimant.

D. W. Steele, for the plaintiff.

[123] START, J. The principal defendant sold and delivered to the trustee milk which was produced from cows owned by the claimant and managed by the defendant, under an agreement in writing whereby the claimant leased her farm, with certain cows and other personal property thereon, for the term of one year, the defendant agreeing to pay to the claimant one-half of the rents and profits, being share and share alike after deducting the expenses and taxes on the farm, and each party holding a lien on his undivided share. By this agreement, the defendant did not undertake to pay any certain quantity of produce, or a definite sum as rents [124] and profits. The right of each party to rents and profits was contingent upon there being anything left after paying the expenses and taxes; and in the residue, if any, they were to share alike. In that part of the printed agreement which provides for a re-entry, the word "rent" is stricken out and the words, "income and profits," are inserted. The words thus inserted in place of "rent," the words, "share and share alike after deducting the expenses and taxes," and the words, "each party to have a lien on his undivided share," indicate that the parties intended that each should own one-half of the produce and products of the claimant's farm and cows, and that they did not intend that the claimant should part with her title to the half, which, by the terms of the agreement, was to be hers. We think the agreement is susceptible of this construction, and that the parties were tenants in common of the milk that was sold and delivered to the trustee.

In Aiken v. Smith, 21 Vt. 172, the defendant leased his farm to the plaintiff for a term of years, the produce to be divided equally between them; and it was held that they were tenants in common of the produce. The holding in Frost v. Kellogg, 23 Vt. 308, is to the same effect.

It appears from the report of the commissioner that, shortly after the service of the writ upon the trustee and before the return day, the claimant and defendant had a looking over of the farm accounts, and that there was found due the claimant, on account of products and profits of the farm and money furnished by her, a sum in excess of the amount found in the hands of the trustee. It would seem from this finding that, at the time the writ was served, the defendant had drawn more than his share of the rents and profits, and that as between him and the claimant, the rents and profits in the hands of the trustee belonged to the claimant; but, if such were not the fact, the funds in the hands of the trustee belonged to the claimant and

defendant jointly and were not subject to process for the sole debt of the defendant.

[125] In Bartlett v. Woodward, 46 Vt. 100, the defendant contracted in his own name to build a bridge for the trustee. One Waterman was, in fact, a partner of the defendant in the transaction, but this was not known to the trustee; and it was held that the trustee was not chargeable for any part of the contract price, in a suit against the defendant to recover a sole indebtedness of his. The holdings in Towne v. Leach, 32 Vt. 747, McNeal Pipe etc. Co. v. Inman Bros., 69 Vt. 181, Fairchild v. Lampson, 37 Vt. 407, are to the same effect.

Judgment reversed and trustee discharged with costs; costs allowed claimant.

COTENANCY—RELATION EXISTS WHEN.—Several persons may together own a thing without being cotenants thereof: McConnel v. Kibbe, 43 Ill. 12; 92 Am. Dec. 93. If two or more persons are entitled to land in such manner that they have an undivided possession, but several freeholds, they are tenants in common. The only common characteristic of a tenancy in common is that of undivided possession: Metcalfe v. Miller, 96 Mich. 459; 35 Am. St. Rep. 617. A tenancy in common arises when the owner of hogs delivers them to another person who agrees to fatten them on the shares: Sheldon v. Skinner, 4 Wend. 525; 21 Am. Dec. 161.

GARNISHMENT OF JOINT DEBT.—Under a writ of execution or attachment against one defendant, his interest in a debt due jointly to himself and another may be garnished: Moore v. Gilmore, 16 Wash. 123; 58 Am. St. Rep. 20; contra, Freeman on Executions, sec. 169.

WHEELOCK *v.* JACOBS.

[70 VERMONT, 162.]

WATERS, PERCOLATING, WHAT ARE.—Waters which have fallen upon land and then percolated to the bedrock and followed it until they passed over it in a low place or through some fissure or hole therein, though they are collected together in a stream running through the fissure or rock, and afterward pass through some subterranean passage or passages and supply a spring, retain their character of percolating waters, where they wander in divers depressions or passages of unknown location, size, and direction until they finally reach a river.

PERCOLATING WATERS ARE PARTS OF THE EARTH ITSELF, as much as the soil and stones, with the same absolute right of use and appropriation by the owner of the land. Hence a proprietor of adjoining lands cannot complain of a diversion of such waters.

A PRESCRIPTIVE RIGHT TO PERCOLATING WATERS cannot be acquired.

PERCOLATING WATERS—WHETHER CONVEYED BY A GRANT OF A SPRING.—A conveyance of a spring of water and of certain buildings and the pipe that conveys the water from the spring to the buildings gives no right to water before it reaches

the spring, and consequently no right to prevent the grantor or his successor in interest from diverting percolating waters from the spring.

T. J. Deavitt and J. P. Lamson, for the orator.

J. H. Senter and W. A. Lord, for the defendant.

[163] ROWELL, J. On January 1, 1872, Eben Scribner, by his warranty deed of that date, conveyed to the orator a dwelling-house, outbuildings, and a spring then supplying said buildings with water. The spring was on other land of the grantor's, and the words conveying it are: "Also a spring of water and the pipe that conveys the water from said spring to said buildings." This is not a spring where water issues from the ground by natural forces, but was formed by excavating three or four feet through the soil to the bed rock, which dips toward the Winooski at quite a sharp angle.

At the bottom of this excavation there is a fissure in the rock through which the water comes into the excavation from the upper side. This fissure was closed on the lower side, and the excavation bricked up, to make a receptacle for the water. In wet times there is usually plenty of water, but in dry times it is scant. The snow and rain that fall on the land above supply the spring with water, which percolates the soil to the bedrock, then follows the rock to the river, "passing over the rock in its lowest places or through some fissure or hole therein," as the master finds.

The orator's grantor subsequently conveyed to J. G. Scribner the land around the spring, except what he had theretofore conveyed by deed, and J. G. Scribner conveyed to the defendant a small piece of it just below the spring, on which the latter, without malice, but for the purpose of obtaining needed water for his own house, dug down to the bedrock, the top of which was "rotten and full of joints," which, on being removed with pick and shovel to the depth [164] of three and a half or four feet below the surface, revealed a fissure or hole in the rock six or eight inches in diameter, through which a stream of water was running large enough to fill a five-eighths pipe, the direction of which, if continued in the same course, would carry it some feet south of the orator's spring. The defendant stopped this hole at the lower end, except putting in a half-inch pipe near the bottom to let the water through, and this formed a small hollow in the rock which filled with water, and from which the defendant took water to his house. Some portion of the water thus

taken by the defendant, theretofore usually found its way into the orator's spring through some subterranean passage or passages, and was one source of its supply; and it is to restrain this diversion of water that the bill was brought.

This is not a case of water flowing in a well-defined channel under ground, but of water coming from rain and melting snows, percolating in varying quantities the soil of an extensive hillside to the bedrock, down which it wanders in divers depressions and passages of unknown location, size and direction, until it finally reaches the river.

Now there are no correlative rights between owners of adjoining land in respect of percolating water, which is regarded as a part of the earth itself, as much as the soil and the stones, with the same absolute right of use and appropriation by the owner of the land in which it is: Chatfield v. Wilson, 28 Vt. 49; Chasemore v. Richards, 7 H. L. Cas. 349: 1 Eng. Rul. Cas. 729. Hence, on this score, the orator's loss is without legal injury, and affords no ground for sustaining the bill.

Nor has the orator acquired a prescriptive right to this water, for the doctrine of prescription is not applicable to percolating water: Angell on Watercourses, 6th ed., sec. 114 p; Lybe's Appeal, 106 Pa. St. 626; 51 Am. Rep. 542; Chasemore v. Richards, 7 H. L. Cas. 349; Roath v. Driscoll, 20 Conn. 533; 52 Am. Dec. 352.

165 But the orator says that his deed conveys the water to him by implication before it reaches the spring, because the maxim is, that when you grant a thing, you are presumed also to grant to the extent of your power that without which the thing granted cannot be enjoyed, and that, therefore, the acts complained of are in derogation of the grant; and he relies on Coolidge v. Hager, 43 Vt. 9, 5 Am. Rep. 256, as fully sustaining his claim. That was a conveyance of a house and lot without mention of a spring owned by the grantor on the land of another, from which water was then running to said house through an aqueduct that was partly in the land conveyed, partly in other adjoining land of the grantor's, and partly in the land of the third person. No question was made, nor could be, but that the grant carried all of the aqueduct that was in the land conveyed, and the court held, on the principle of the maxim invoked, that the grant of the house and the land and of that part of the aqueduct in the land, carried with them the water as it was then running, with the right to the spring and the aqueduct sufficient for its continuance, as an appurtenance of the house and the land.

But that case is not like this. There the question was whether the spring was conveyed at all or not, while here it is, not whether the spring was conveyed, but whether the grant of it conveyed, by implication, percolating water before it reached the spring, and so the question is as to the extent of the grant, as it was in Minard v. Currier, 67 Vt. 489, which is much in point. That was a conveyance in fee of certain springs or wells fed by percolating water, with a further conveyance of all the grantor's right to the water that would naturally flow into them. It was said that a grant of the land containing the wells would not have deprived the grantor nor his grantees of the right to dig upon the remaining land to the injury of the wells, but that a right to percolating water greater than would be acquired by a deed of the land could be created by apt and sufficient [166] words, and if the language of the deed clearly imports such right, the law will recognize it, and it was held that the further conveyance did import such right in that case, and conveyed the water that the wells would receive when nothing was done to intercept its passage. Whitehead v. Parks, 2 Hurl. & N. 870, is to the same effect. Now there is no difference between granting land containing a spring, and granting a spring without more; and in each case, although the grantee takes the fee, he must stand on his common-law right as to percolating water. The orator's deed gives him the spring and the water therein and flowing therefrom, but it gives him no right to water before it reaches the spring, and consequently no right to prevent his grantor nor those claiming under him from diverting it from the spring.

Brain v. Marfell, 41 L. T. Rep. 455, 20 Am. Law Reg., N. S., 93, is a leading case on this subject, and a stronger one for the plaintiff therein than this is for the orator. There the defendant sold a spring to the plaintiff, and the sole right to the water therein and obtainable therefrom, with the right of conveying the same through a pipe in the defendant's land to the plaintiff's dwelling-house, with the right of entry for repairs and other proper purposes, with a declaration that the plaintiff, his heirs and assigns, should be the absolute owner of the spring, and a covenant of quiet enjoyment. The defendant subsequently sold some of his land near the spring to a railroad company, which made a tunnel through it that destroyed the spring, whereupon the plaintiff sued the defendant for a breach of his contract; and it was held that the defendant had conveyed the water only after it reached the spring, and that draining the water before it

reached the spring was no breach. Lord Coleridge said in the course of his opinion, that in a case on the western circuit, the name of which he did not remember, it was held that in the conveyance of a spring with the water flowing from it, the [167] springhead, with the definite stream of water flowing from it, was meant, and that interference with the water before it reached the head, or before it began to run in a definite channel, was not actionable.

In Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157, the owner of a farm granted to the plaintiff, with a covenant of warranty, the right to dig and stone up a spring thereon, and to lay a pipe therefrom to plaintiff's house. Held, that the entire farm was not thereby made servient to the grant, and that the grantor's assignee might lawfully dig a spring near plaintiff's spring, though it was thereby rendered useless.

Lybe's Appeal, 106 Pa. St. 626, 51 Am. Rep. 542, was, like this, a bill for an injunction. There the grantor of land reserved the right to conduct water from a spring thereon to his adjoining land, on which a well was subsequently dug, whereby the subterranean supply of the spring was cut off, and an injunction was denied.

In Chesley v. King, 74 Me. 164, 43 Am. Rep. 569, the grantor of land reserved the privilege of taking water from a spring thereon to his house and barn and pasture. The court said that while the grantor's rights in the spring were completely subject to the grantee's right to consult his own convenience and advantage in the digging of a well in the land conveyed for better supplying it with water, yet if he dug the well for the sole and malicious purpose of cutting off the sources of the spring and injuring the plaintiff, he would be liable. By our law it is immaterial with what motive a man does an act lawful in itself.

Decree affirmed and cause remanded.

Taft. J., dissents.

As to What are Percolating Waters.*

The rules of law applicable to watercourses on the surface of the earth may be considered as pretty well settled, and form an immensely important branch of the law. To a great extent, the same may be affirmed concerning the rules governing subterranean waters. The distinction between the legal status of a known, defined, or reasonably ascertainable underground watercourse, and that of percolating waters, is well-settled. It is recognized in gen-

*REFERENCE TO MONOGRAPHIC NOTES.

Subterranean or percolating waters: 64 Am. Dec. 721-730.

eral terms in a great mass of cases. It being established in any given case that underground water has such flowage, channel, direction, volume, and continuity that, were it laid bare and made to run above ground, it would constitute a watercourse; and it being further established that the location of such underground current and of its channel is known or notorious, the rules of law which are to govern its appropriation, obstruction, diversion, or pollution are easily found. In general, such underground water has the legal status of a surface watercourse. In it, the rights of upper and lower proprietors are correlative. On the other hand, however, if, in any given case, it is beyond question that certain underground water is percolating water, purely and within the definition given later herein, little difficulty will be found in determining any conflict of rights which may have arisen with reference thereto.

In any controversy concerning underground waters, the pivotal question, more important than any other, and the decision of which will be practically decisive of all others, is as to the character of the water itself: Has it the qualities which raise it to the dignity of a surface watercourse, or is it merely percolating water, part and parcel of the land under which it is found, of unknown source, channel, current, and direction, a wanderer without standing in the eyes of the law? Were we to include in this note a consideration of the property rights in underground waters, and the remedies by which such rights are enforceable, we should not only be forced to extend it beyond reasonable limits, but should commit the graver error of commonplace recapitulation and repetition of matters easily found elsewhere, and about which there is little that is unsettled or doubtful. Therefore, our single aim will be to ascertain what is percolating water. To do this we must determine the distinctive qualities of such water, and the criteria by which the character of underground water in any given case is fixed.

Subterranean Waters which are not Percolating.—Speaking broadly, the rules of law governing waters may be divided into two classes—those applicable to watercourses, with known and defined channels whether above or below the earth's surface, and those applicable to waters, wherever found, which have no channel, current, or direction which is known or ascertainable. Percolating water is governed by the second class of rules. Approaching our subject by a process of elimination, we will first ask ourselves, What underground water is not percolating? All waters flowing underground in known and defined channels constitute watercourses to which the ordinary rules are applicable. The distinction between such waters and percolating waters is recognized in general terms in many cases, but by reason of the very generality of those terms we are confronted by a definition which needs itself to be defined. Thus in the great case of Chasemore v. Richards, 7 H. L. Cas. 349, Lord Wensleydale said: "Now the right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known and definite channel is equally a right ex natura, and an incident to the land itself as a beneficial adjunct to it," and Lord Chelmsford, in stat-

ing the same proposition, spoke of "water flowing in a certain and defined course in a known subterranean channel." In America, this condition of underground water has been described as flowing in defined channels: Hanson v. McCue, 42 Cal. 303; 10 Am. Rep. 299; subterranean stream: Hougan v. Milwaukee etc. R. R. Co., 35 Iowa, 558; 14 Am. Rep. 502; running in defined channels: Strait v. Brown, 16 Nev. 317; 40 Am. Rep. 497; having clearly defined channels: Burroughs v. Satterlee, 67 Iowa, 396; 56 Am. Rep. 350; underground streams or rivers which are known and notorious and flow in a natural channel between defined banks: Bloodgood v. Ayer, 108 N. Y. 400; 2 Am. St. Rep. 443; defined subterranean flow of water amounting to a regular and constant stream: Wheatley v. Baugh, 25 Pa. St. 528; 64 Am. Dec. 721; subsurface streams flowing in permanent, distinct, and well-defined channels, unmixed with the earth through which they flow: Frazier v. Brown, 12 Ohio St. 294; flowing in a well-defined and constant stream in a subterranean channel: Shively v. Hume, 10 Or. 76.

The importance of the ascertainability of the presence and location of an underground stream in order that it may escape being classed with percolating waters is emphasized in many cases. Its existence, it is held, must be known or easily ascertainable: Williams v. Ladew, 161 Pa. St. 283; 41 Am. St. Rep. 891; Lybe's Appeal, 106 Pa. St. 626; 51 Am. Rep. 542. The distinction is drawn between subsurface water which, without any distinct, definite, and known channel, percolates or filters through the soil, and such water when it has assumed the proportions of a well-defined and constant stream, with a known channel: Tampa Water Works Co. v. Cline, 37 Fla. 586; 53 Am. St. Rep. 262; Springfield Waterworks Co. v. Jenkins, 62 Mo. App. 74; Taylor v. Welch, 6 Or. 199.

In order that a subsurface stream may be treated as a watercourse, its course must be discoverable from the surface of the ground: Lybe's Appeal, 106 Pa. St. 626; 51 Am. Rep. 542. No subsurface explorations should be necessary to define its course: Haldeman v. Bruckhart, 45 Pa. St. 514; 84 Am. Dec. 511. It is generally agreed that an underground stream, the location and course of which can only be discovered by excavation, is not a known stream governed by the rules applicable to surface watercourses: Chasemore v. Richards, 7 H. L. Cas. 349; Ewart v. Belfast Poor-Law Guardians, 9 L. R. Ir. 172. Compare Burroughs v. Satterlee, 67 Iowa, 396; 56 Am. Rep. 350.

It would be difficult to state the problem as to when an underground watercourse has a defined and known channel, in better terms than is done in Black v. Ballymena Commrs., 17 L. R. Ir. 459. Having stated that the rules as to riparian rights apply to subsurface streams having defined and known channels, the vice-chancellor said: "So far the law on the subject is clear; but a difficulty appears still to exist as to the application of this rule by reason of the use of the word 'known' in connection with the word 'defined,' and it does not seem to have been laid down as yet what the nature or extent of the knowledge is which must be proved to exist in order to constitute the riparian relation. It cannot mean that a chan-

nel should be visible throughout its course, which would be in impossibility from the very fact of its being subterranean. In considering this question, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel; but must be knowledge, by reasonable inference, from existing and observed facts in the natural, or rather the pre-existing, condition of the surface of the ground. The onus of proof lies, of course, on the plaintiff claiming the right, and it lies upon him to show that, without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream when it emerges into light comes from, and has flowed through, a defined subterranean channel. The instance given in some of the cases of a stream sinking underground when it reaches a certain place, and pursuing for a short space a subterraneous course, and then emerging shows plainly the kind of knowledge required. No one knows as a matter of fact that it flows underground from the one point to the other in a defined channel, or, indeed, even that it is the same stream; but our reason, grounded on our knowledge or ordinary laws, and on the impossibility or great improbability of the phenomena being otherwise accounted for, leads to an inference of fact, amounting practically to knowledge, that it is the same stream and that it has flowed underground in a defined channel."

The fact that upon certain excavations being made on defendant's land and a flow of water obtained, the water ceased to rise in a spring on plaintiff's adjoining land, does not prove that such spring is fed by a known and defined subsurface stream, the waters of which are diverted by the excavations aforesaid: Taylor v. Welch, 6 Or. 199. Surface depressions or sinks extending in a line on either side of a spring of considerable volume may give notice of the location of a defined underground stream, especially in a limestone region where such phenomena justify such an inference: Tampa Water Works Co. v. Cline, 37 Fla. 586; 53 Am. St. Rep. 262. The nature of vegetable growth on the earth's surface has also been appealed to as giving notice of the location of an underground stream. In Hale v. McLea, 53 Cal. 578, it appeared that the plaintiff had for some time used the waters of a spring located on his land near the boundary between his land and that of the defendant. From this natural spring extending upon the land of the defendant there was a line of bushes usually found nowhere except over watercourses, but there was no other indication of a subterranean stream upon defendant's land at this point than that given by the bushes. There was no stream upon the surface, and no depression or channel whatever appeared upon the surface of either tract at this point, and the surface of the ground was rocky and dry. The defendant, aiming to intercept upon his own land the water flowing to plaintiff's spring, dug a pit upon the line of the bushes, discovered a small stream, and appropriated the water therein, with the result that the spring of the plaintiff at once ceased to flow. Upon suit being brought, the lower court found that

any person of ordinary judgment would have expected to intercept the stream at the point of the excavation, from the apparent situation and surroundings, and gave judgment for plaintiff, which was affirmed on appeal. But in Bloodgood v. Ayers, 108 N. Y. 400, 2 Am. St. Rep. 443, it was held that water flowing in no defined channel, and the course of which can only be traced by the deeper green of the grass which it moistens, does not constitute a watercourse, and that the rules as to watercourses do not apply to springs whose waters flow underground, concealed, and the place of whose flow is a matter of uncertainty. Where a stream of water flowing in a canon disappeared completely at one point, and farther down at the mouth of the canon two springs appeared, which, from the conditions and topography of the country, could not reasonably be supposed to be otherwise fed than by the stream which had disappeared at the point above, and it being given in evidence that a diversion of the stream above the point of disappearance had been coincident with an interruption of the flow of the springs, it was held sufficiently proved "that the water flowing from the springs at the mouth of the canon was furnished through as well defined a subterranean channel as it would be ordinarily practicable to describe": Keeney v. Carillo, 2 N. Mex. 480.

It was said by Pollock, C. B., in Dickinson v. Grand Junction Canal Co., 7 Ex. 282: "And, indeed, if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course and then emerge again, it could never be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." Such a case is that of Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62, where it was held that a stream which, though mostly underground, has its course and direction distinctly marked, and at intervals runs above ground, must be regarded as a subterranean stream having a known and defined channel. Such a stream was held to be shown in Whetstone v. Bowser, 29 Pa. St. 60. It was there put in evidence that a considerable stream of water coming from underground propelled the machinery of Bowser's mill, and that about two miles above, on Whetstone's farms, Cove creek disappeared into a sink. The identity of the stream disappearing on Whetstone's farm with that which emerged at Bowser's mill was, however, admitted, and the important element of the ascertainability of the location of the underground stream was not noticed. Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721, is properly regarded as a leading American case on the subject of underground waters. In that case the plaintiff, a tanner, was deprived of the use of a valuable spring on his premises by mining operations on defendant's land which intercepted the subterranean sources of the spring. There was no proof of the character of these sources, whether they were mere percolations or underground streams with known and defined channels, though it appears that the defendant was not chargeable with notice of their location, whatever might be

their character. While admitting that valuable rights may exist in underground waters, especially in limestone regions, where "streams of great volume and power pursue their subterranean courses for great distances, and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water for all the purposes of life," Lewis, C. J., insists that to entitle a stream, whether surface or subterranean, to the consideration of the law, it is certainly necessary that it be a watercourse in the proper sense of the term, which is another way of saying that it must have a defined and known channel: See, also, to the same point, Good v. Altoona City, 162 Pa. St. 493; 42 Am. St. Rep. 840; Case v. Hoffman, 84 Wis. 438; 36 Am. St. Rep. 937; Springfield Water Works v. Jenkins, 62 Mo. App. 74; Trustees etc. v. Youmans, 50 Barb. 316; Willis v. Perry, 92 Iowa, 299.

Underground Watercourses—Ascertainability of Channel, and its Importance.—We have noticed at length the cases discussing underground waters which are not considered percolating, because we wish to emphasize the importance of the ascertainability of the existence or location of such waters as a criterion for distinguishing percolating waters from underground watercourses, and for the further purpose of determining what ascertainability means in this connection. From the view we have taken of the cases we may say with the court in Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143, 17 Am. St. Rep. 791: "It is therefore clear, from the principles and reasoning of all the cases, that the distinction between rights in surface and subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, and course." And we must indorse the conclusion lately reached in Crescent Min. Co. v. Silver King Min. Co. (Utah, Aug. 1898), that whenever a stream is so hidden in the earth that its course is not discoverable from the surface, it cannot receive at the hands of the law the consideration due a watercourse: Lybe's Appeal, 106 Pa. St. 626; 51 Am. Rep. 542. Though it has been said that the important question in this connection is as to whether underground water flows in a defined channel: Hanson v. McCue, 42 Cal. 303; 10 Am. Rep. 299; Shively v. Hume, 10 Or. 76; it must appear, from a full view of the authorities, that even that consideration must yield in importance to the criterion of paramount importance—the discoverability, from the surface of the earth, of the location, existence, and flow of waters immediately beneath. The latter is not, however, the exclusive criterion. While, as we shall note later, underground streams, of whatever extent and volume, and with well-defined channels, will be considered percolating waters in the eyes of the law if their existence and location are unknown or not reasonably ascertainable, a statement of the converse of the proposition would scarcely find support among the adjudicated cases. The necessity of a defined channel is unanimously recognized. It is not difficult to suppose a case in which the existence, location, and flow of subterranean waters of undoubted per-

colating character might be well known, yet such waters, as the law stands at present, would be percolating waters beyond a doubt. The importance of the character of the flow must not be overlooked. It is not unlikely that considerable litigation will center about this point in the law of underground waters in the near future, especially in the western states, where water is an element of unusual value and importance. But whatever liberality some courts have shown in recognizing rights in underground waters, the character of whose flow would scarcely give them the dignity of watercourses if they were on the surface of the earth, none of the cases have gone so far as to recognize such rights in "water which was percolating through sand or gravel within limits not at all defined by anything appearing upon the surface, or made to appear by investigation beneath the surface": Meyer v. Tacoma Light etc. Co., 8 Wash. 144.

Underground Waters which are Percolating.—In discussing underground waters which are viewed by the law as watercourses, we have gone to a considerable degree into the question, What underground waters are percolating? Having eliminated waters of the former class, the discussion could not be properly closed, however, with the statement that all other subsurface waters are percolating. The word "percolate" in this connection has been said to designate "any flowage of subsurface water, other than that of running streams, open, visible, and clearly to be traced": Mosier v. Caldwell, 7 Nev. 363. While this is, perhaps the most nearly correct of the definitions attempted in the cases, it might be improved upon. Keeping in mind the explanation of the words "defined" and "known" given in Black v. Ballymena Commrs., 17 L. R. Ir. 459, and already quoted herein, we would define percolating waters as including all subsurface flowage not in defined and known channels. Various descriptions and definitions have been given. In Chasemore v. Richards, 7 H. L. Cas. 349, Mr. Justice Wightman contrasted the condition of surface watercourses with "subterranean water not flowing in any definite channel, nor indeed at all in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall"; and Lord Chelmsford, delivering an opinion in the same case, describes percolating water as "percolating through underground strata which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates." Such water is described as "oozing or percolating through the soil in varying quantities and uncertain directions": Strait v. Brown, 16 Nev. 317; 40 Am. Rep. 497; as "subsurface waters which without any permanent, distinct or definite channel, percolate in mere veins, ooze or filter from the lands of one owner to the lands of another": Frazier v. Brown, 12 Ohio St. 294; as spreading in every direction through the earth: Wheatley v. Baugh, 25 Pa. St. 528; 64 Am. Dec. 721; as "subterranean waters percolating the soil, or running through unknown channels, and without a distinct or defined course": Trustees etc., v. Youmans, 50 Barb. 316; Southern Pacific R. R. Co. v. Dufour, 95 Cal. 615; as "flowing, seeping, or

circulating in minute particles without banks or defined channels," and with a course that is invisible and unknown: Crescent Min. Co. v. Silver King Min. Co. (Utah, Aug., 1898); Taylor v. Fickas, 64 Ind. 167; 31 Am. Rep. 114.

The difficulty of subjecting percolating water to legal regulation is thus summed up in Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352: "Water combined with the earth or passing through it, by percolation, or by filtration, or by chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform and cannot be known or regulated. It raises to great heights and moves collaterally by influences beyond our apprehension. These influences are so secret, changeable, and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules as has been done with streams upon the surface."

Quotations of similar tenor might be given at much greater length, but enough have been made to afford us an idea of the legal conception of percolating water. Two elements are especially emphasized: the nature of the flow, and its nonascertainability. Water which moves through the soil without forming channels is percolating water: Wilson v. New Bedford, 108 Mass. 261; 11 Am. Rep. 352. A defined channel is held to be the element of especial importance: Hanson v. McCue, 42 Cal. 303; 10 Am. Rep. 299; Burroughs v. Satterlee, 67 Iowa, 396; 56 Am. Rep. 350; yet it is well settled that underground streams with well-defined channels will be treated as percolating waters, if their existence and location are unknown and not reasonably ascertainable: Haldeman v. Bruckhart, 45 Pa. St. 514; 84 Am. Dec. 511; Williams v. Ladew, 161 Pa. St. 283; 41 Am. St. Rep. 891; Greencastle v. Hazelett, 23 Ind. 189; Ellis v. Duncan, 21 Barb. 230; Taylor v. Welch, 6 Or. 199; Case v. Hoffman (Wis., Sept., 1897); Chase v. Silverstone, 62 Me. 175; 16 Am. Rep. 419. So the mere fact that underground water flows in a definite direction does not prevent it from being percolating water: Gould v. Eaton, 111 Cal. 639; 52 Am. St. Rep. 201; while on the other hand, it is not essential to a watercourse that the banks should be absolutely unchangeable, the flow constant, the size uniform, or the waters entirely unmixed with earth, or flowing with any fixed velocity: Bassett v. Salisbury Mfg. Co., 43 N. H. 569; 82 Am. Dec. 179; Tampa Water Works Co. v. Cline, 37 Fla. 586; 53 Am. St. Rep. 262. There is no distinction between the rules of law applicable to surface watercourses and those applicable to subsurface watercourses, as has been said above: Willis v. Perry, 92 Iowa, 297; and if, in any case where the character of underground water is in question, the facts are in dispute, the determination of the question may be rendered exceedingly difficult.

Presumption as to Character of Underground Water.—In a majority of cases, the exact condition of underground water is not accurately known or ascertainable: Swett v. Cutts, 50 N. H. 439; 9 Am. Rep.

276. In such cases a presumption regarding such condition is necessary, and it is well settled that unless it appears that underground water in a given case flows in a defined and known channel, it will be presumed to be percolating water: Tampa Water Works Co. v. Cline, 37 Fla. 586; 53 Am. St. Rep. 262; Hanson v. McCue, 42 Cal. 303; 10 Am. Rep. 299; Metcalf v. Nelson, 8 S. Dak. 87; 59 Am. St. Rep. 746; Elster v. Springfield, 49 Ohio St. 82; Gould v. Eaton, 111Cal. 639; 52 Am. St. Rep. 201; Ocean Grove etc. Assn. v. Asbury Park, 40 N. J. Eq. 447; Springfield Water Works Co. v. Jenkins, 62 Mo. App. 74. The obvious effect of this presumption is to cast the burden of proof upon him who claims rights in subterranean waters upon the ground that they flow in a defined and known channel: Black v. Ballymena Commrs., 17 L. R. Ir. 459.

Some Instances of Percolating Water.—The English law as to subsurface waters is generally considered to date from the case of Acton v. Blundell, 12 Mees & W. 324. But it may be said of that case, as of many others that have settled the law as to rights in underground waters, that it throws little light upon the question which we have in hand, namely, What is percolating water In that case a well on plaintiff's land was deprived of its hidden sources by mining operations on defendant's land—a plain case of percolating water. In Dickinson v. Grand Junction Canal Co., 7 Ex. 282, the distinction between percolating water and water flowing underground in defined and known channels, was recognized. In Chasemore v. Richards, 7 H. L. Cas. 349, the law of underground waters received a most thorough consideration, and although Dickinson v. Grand Junction Canal Co., 7 Ex. 282, is questioned upon one point, these three cases stand together as leading ones, in all of which the character of the underground water was scarcely in doubt, the entire question being as to the rules governing the diversion of percolating waters.

The principal case gives an excellent example of percolating water. It is there held that water coming from rain and melting snows, percolating the soil of a hillside to bedrock, down which it wanders in depressions and passages of unknown location, size, and direction, is percolating water clearly distingushable from water flowing in known and defined channels: Wheelock v. Jacobs, 70 Vt. 162; ante, p. 659. So water which moves from the mountainsides to a stream below by following the seams and cracks in the strata of sandstone of which the mountains are composed is percolating water, and its character as such is not altered by the fact that at one place it breaks through the sandstone, forming small springs which, without a defined channel or current, find their way into the stream: Gould v. Eaton, 111 Cal. 639; 52 Am. St. Rep. 201. Water, whether it has fallen as rain, or has come from the overflow of a pond or swamp, which sinks into the top soil and struggles through it, following no defined channel, is percolating water. It is not water in a watercourse, or in an infinitesimal number of minute watercourses in the sense of being obedient to the law regulating the use of water flowing in such defined natural channels: Buffum v. Harris, 5 R. I. 243. Other cases in which the especial qualities

of percolating waters are discussed, but which we will not notice at length, are: Springfield Waterworks Co. v. Jenkins, 62 Mo. App. 74; Southern Pacific Co. v. Dufour, 95 Cal. 615; Bruening v. Dorr, 23 Colo. 195; Hanson v. McCue, 42 Cal. 303; 10 Am. Rep. 299; Kinnaird v. Standard Oil Co., 89 Ky. 468; 25 Am. St. Rep. 545; Ocean Grove etc. Assn. v. Commrs. of Asbury Park, 40 N. J. Eq. 447; Wheatley v. Baugh, 25 Pa. St. 528; 64 Am. Dec. 721; Ellis v. Duncan, 21 Barb. 230; Crescent Min. Co. v. Silver King Min. Co. (Utah, Aug., 1898); Lybe's Appeal, 106 Pa. St. 626; 51 Am. Rep. 542.

The result of these cases is to establish the main distinction between percolating waters and subsurface streams with known and defined channels, which distinction is the matter of knowledge which we have already emphasized herein—the actual knowledge or reasonable ascertainability of the existence and location of underground water flowing in defined channels. It must be said that there are points in the law of underground waters that are unsettled. It is often a matter of great difficulty to decide whether or not a surface watercourse exists, there being variables as to channel, volume, velocity, and flow which may raise such difficulty. The same difficulty is commonly met with in determining controversies relative to underground waters. The result is a gradual process of defining a definition, of deciding what is a defined channel and when it is a known channel. Besides this, the unsettled relative importance of the character of the flow, and of its ascertainability, in the determination of the character of subsurface water in any case, affords problems which future litigation must solve.

AITKEN *v.* WELLS RIVER.

[70 VERMONT, 308.]

TAKING PROPERTY FOR A PUBLIC USE—WHAT IS NOT.—The destruction of property to avert an imminent public injury is not a taking for a public use, and is, in no legal sense, an exercise of the right of eminent domain. The former is an exercise of the police power, and the latter stands on constitutional grounds. The taking of property for a public use can await the forms and delays of the law, but the destruction of property to prevent imminent public injury is governed by necessity, which knows no law.

MUNICIPALITIES ARE NOT ANSWERABLE FOR DESTROYING PRIVATE PROPERTY to prevent imminent public injury. If the destruction can be justified on the ground of public necessity, the owner has no right of recovery. Liability against the corporation is not created by a statute expressly conferring upon its officers authority to destroy property when so necessary.

A MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR ACTS OF ITS OFFICERS in discharging its governmental functions, as in destroying property to avert imminent public injury.

J. H. Watson, for the plaintiff.

Smith & Sloane, for the defendant.

[308] ROWELL, J. The defendant is an incorporated village, and constitutes a highway district of the town. All the highway taxes assessed by the selectmen on the polls and ratable estate of the village are collected like other village taxes, and two-thirds thereof paid to the village treasurer, and the trustees of the village are to expend the same in building and maintaining highways and bridges, and they are authorized to lay out, alter, maintain, and discontinue [309] highways, and to appraise and settle the damages therefor; and the village can lay a tax for any of those purposes.

The by-laws of the village authorize the trustees to draw orders on the village treasurer for the payment of any sums assessed as damages for land or other property taken or improved for a highway or other public use, and provide that the trustees may remove nuisances and direct the cleaning, repairing, and improvement of streets, commons, lanes, walks, and bridges. The charter authorizes the village to make by-laws for protecting its highways from injury, but it does not appear that any have been made.

Before and at the time in question, the plaintiff owned a mill in said village, and a dam across Wells river, and on the mill side of the river was a highway, also in the village. At said time, because of rains or otherwise, the water of the river was very high, and carried away part of plaintiff's dam, and cut a channel around the mill and between it and the highway, which it was badly washing out, and to change the current away from the highway, to prevent further damage to it and to other property, the trustees burned the mill and its contents and blew up and destroyed the dam; and the question is, whether the village is liable for their action.

The plaintiff contends that this was a taking of his property for public use by an exercise of the right of eminent domain; that the trustees had a right, in the circumstances, to take it as they did, and therein were acting within the scope of their authority; that therefore he is entitled, under the constitution, to compensation from the village; and as the taking was without compensation, that the village is liable in this action.

But this proposition cannot be maintained, for this was not a taking of the plaintiff's property for a public use in the sense contended for, but a destruction of it to avert an imminent public injury, which is a different thing from taking by the right of eminent domain, and is in no legal [310] sense an exercise of that right, but stands on entirely different ground, namely, on

the ground of necessity, or, more properly speaking, on the ground of the police power of the state, whereas the right of eminent domain stands on constitutional grounds.

In Field v. Des Moines, 39 Iowa, 575, 18 Am. Rep. 46, 56, it is said that the great weight of judicial authority holds that the destruction of property under authority conferred by law upon officers of municipal corporations is not an exercise of the right of eminent domain, but a regulation of the right that individuals have to destroy private property in cases of inevitable necessity, to prevent the spreading of fire or other great calamity.

In Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613, the distinction between an exercise of the right of eminent domain and a police regulation to meet an impending peril by the destruction of property is sharply drawn. It is said that one can wait the forms and delay of the law, but that the other is governed by necessity, which knows no law; and reference is made to the unwise delay of the lord mayor of London to destroy some wooden buildings, which caused half that city to be burned in the great conflagration of 1666.

In Russell v. Mayor etc., 2 Denio, 461, a case that grew out of the great fire of 1835, it is said that authority conferred by statute upon the mayor to order the destruction of buildings to prevent the spreading of a fire is not a grant of a right of eminent domain, and therefore not within the constitutional provision requiring compensation for property taken for public use, but that it is a regulation of the right that individuals possess to destroy private property to avert a public calamity. But in Hale v. Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190, a case growing out of the same fire, the court of errors and appeals of New Jersey held that said statute granted power not before existing, and that therefore it was the grant of a [311] right of eminent domain. That case was again before the court, with the American Print Works against the same defendant, in Hale v. Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420, 431, when the distinction above stated was clearly made. The distinction is well stated by Senator Verplanck in Stone v. Mayor etc., 25 Wend. 157, 173, which also grew out of that fire: See, also, Randolph on Eminent Domain, secs. 8, 9; 1 Dillon on Municipal Corporations, 4th ed., sec. 141.

The plaintiff cites Bishop v. Mayor, 7 Ga. 200, 50 Am. Dec. 400, in which it was held that the owners of property destroyed to stay a conflagration were entitled under the constitution to compensation, and that the city was liable on the ground of an

implied assumpsit, for which proposition Mayor v. Lord, 17 Wend. 285, 18 Wend. 126, is referred to as authority. But in that case liability was imposed by statute, without which it was expressly said that no liability would exist. It is said in Field v. Des Moines, 39 Iowa, 575, 18 Am. Rep. 46, that Bishop v. Mayor, 7 Ga. 200, 50 Am. Dec. 400, stands alone, and that, in the language of the supreme court of California in Dunbar v. Alcalde etc., 1 Cal. 358, without some charter or other statutory enactment imposing liability, the decision cannot be sustained.

It is decisive of this question that if the act complained of can be justified on the ground of public necessity, as it must be if justified at all, the plaintiff's loss is a damage without legal injury.

The plaintiff further contends that the by-law that authorizes the trustees to remove nuisances and to direct the cleaning, repairing, and improvement of streets, commons, lanes, walks, and bridges, makes them the servants and agents of the village, and that thereby the village undertakes to perform those duties by its servants and agents whom it may control, and not because the duty is imposed upon it by law, and that therefore the village is [312] liable on the principle of respondeat superior. But this contention cannot be maintained.

There is no statute, nor provision in its charter, nor by-law, that makes the village liable; and assuming without deciding that the by-law referred to authorized the act complained of, and that the village had power to authorize it, yet the by-law did not make the trustees the servants and agents of the village so that the principle of respondeat superior applies.

The city council of Charleston, South Carolina, acting under the general municipal powers of the city, without any statute creating liability, adopted an ordinance authorizing the intendant, among other officers, in time of fire to demolish such buildings as might be judged necessary by him to prevent the further spread of a fire, thereby investing that officer with power to judge whether the necessity existed. A fire being in progress, the plaintiff's house was blown up by order of the intendant, and the fire was subsequently extinguished before it reached his premises. He brought an action of trespass against the city, claiming that the property was destroyed without necessity, and that the ordinance authorizing the intendant to destroy the property for the benefit of the city was sufficient to charge the city in case he proved that the destruction was unnecessary, and that the intendant had abused his discretion. But the court

gave judgment against the plaintiff, on the ground that the city, being a municipal corporation, was not liable to an action unless given by statute: White v. Charleston Council, 2 Hill (S. C.) 571. Judge Dillon says the result of this case was right, but that, assuming the power to pass the ordinance, the decision should have been put upon the ground that the intendant was discharging a public, as distinguished from a municipal, or corporate, duty, and was not in that matter to be regarded as the agent of the city, and that therefore the city was not, on the principle of respondeat superior, responsible [313] for his acts: 2 Dillon on Municipal Corporations, 4th ed., sec. 975, note 1.

In McDonald v. Red Wing, 13 Minn. 38, it was held that a city is not liable for the destruction of a building torn down to arrest the progress of a fire, unless such liability is created by statute, and that it makes no difference whether the building is torn down by direction of the city officers assuming to act in their official capacity, or by citizens and bystanders on their own motion.

Field v. Des Moines, 39 Iowa, 575, 18 Am. Rep. 46, above cited, was an action to recover the value of buildings destroyed by order of the mayor to prevent the spread of a fire. It was contended that as the city, by its ordinance, had authorized the mayor to judge of the emergency and to direct the destruction of the buildings, it thereby made his acts the acts of the city. The court said it would not stop to inquire whether the statute authorized the city to pass the ordinance under which the mayor acted, for if it did, and the ordinance was valid, and authorized the mayor to judge of the emergency, yet the city was not liable for his acts, in the absence of a statute creating such liability. There are numerous other cases to the same effect, but it is not necessary to refer to them.

The case at bar falls clearly within that class of cases in which the municipality is exempt from liability in the absence of a statute imposing it, on the ground that the act complained of is not its act, but the act of persons who are deemed to be public officers, and who, though appointed and paid by the municipality, and though its agents, perhaps, for other purposes, yet are held not to sustain that relation to it in respect of the particular act in question. This is upon the ground that the municipality acts in the matter in a governmental capacity, and, as it were, for and on behalf of the state, and therefore, in the absence of a statute making it otherwise, enjoys the same immunity from liability for the acts of its officers that the state itself

314 would enjoy had it done the same thing by its own officers: Freel v. School City etc., 142 Ind. 27. This doctrine is held and applied in Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762, and Weller v. Burlington, 60 Vt. 28. Nor is Whipple v. Fair Haven, 63 Vt. 221, in conflict with it. That case was not put on the ground of respondeat superior, but on the ground that the village owed the orators, not a general duty as a part of the public, but a special duty as individuals, not to discharge water upon their land, and that the injury complained of was imputable to a neglect of that duty by the village itself, and not to the wrongful act of its trustees, and that the orators' land could not thus be subjected to servitude for the benefit of the public.

Judgment affirmed.

EMINENT DOMAIN—PUBLIC USE—DESTROYING PROPERTY TO STAY CONFLAGRATION.—A municipal corporation may take, use, or destroy the private property of an individual for the public safety in the case of an actual necessity to prevent the spread of a fire, or any other great public calamity. In such case, the individual sufferers are entitled to just compensation from the public for their loss: See monographic note to Sheehy v. Kansas City Cable Ry. Co., 4 Am. St. Rep. 403.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF AGENTS—DESTRUCTION OF PROPERTY TO STAY CONFLAGRATION.—Municipal corporations are not liable in damages for the manner in which they exercise, in good faith, their discretionary powers of a public, legislative, or quasi judicial character, but are liable where their duties cease to be judicial in their nature and become ministerial: Chicago v. Seben, 165 Ill. 371; 56 Am. St. Rep. 245; Springfield etc. Ins. Co. v. Keeseville, 148 N. Y. 46; 51 Am. St. Rep. 667, and notes. Municipal liability cannot be established by proof that the fire department, or some member thereof, needlessly or negligently caused the destruction of plaintiff's property, whether such destruction arose from the negligent management of some appliance, or from a mistaken judgment in ordering the destruction of property to arrest an existing conflagration: See monographic note to Goddard v. Harpswell, 30 Am. St. Rep. 399.

THATCHER v. LYONS.

[70 VERMONT, 438.]

STATUTE OF LIMITATIONS IN ACTIONS ON JUDGMENTS—SUSPENSION OF BY A LEVY OF EXECUTION.—A levy upon personal property operates as a satisfaction of the judgment for the time being and suspends the right to action thereon. Hence, in computing the time in which an action may be maintained upon a judgment, the period while the right of action was suspended by the levy of an execution must be excluded.

JUDGMENT.—AN ACTION CANNOT BE SUSTAINED upon a judgment while an execution is in the hands of an officer and a levy thereunder remains undisposed of.

Barber & Darling, for the plaintiff.

Martin & Archibald, for the defendant.

[438] THOMPSON, J. This is an action of debt on judgment commenced April 23, 1896. The judgment declared on was rendered April 13, 1888. The plaintiff took out execution May 11, 1888, and the same day placed it in the hands of an officer for collection. The plaintiff was a subsequent attaching creditor on his original writ, and his execution was forced to await the disposition of the senior execution levied upon the property attached. March 25, 1889, plaintiff's execution was duly returned satisfied in part. All the attachable property which the defendant then had was taken and sold on it, so that he had none subject to attachment when it was returned.

The defendant pleads and relies upon the statute of limitations (V. S. 1196), which requires actions of debt on judgment to be brought within eight years from the rendition thereof. [439] This defense must prevail, unless the operation of the statute was stayed by the issuing of the execution and proceedings thereunder.

It has been held that where an execution and judgment are apparently satisfied by a levy, which is subsequently vacated by proper proceedings, the statute does not run on the judgment during the time it was thus satisfied: Fairbanks v. Devereaux, 58 Vt. 363, and cases there cited. In that case, it was said that this statute "is not to be construed literally, but that a new promise, or any other fact that clearly rebuts the presumption of payment during the existence of such fact, suspends the operation of the statute, and that the statute commences running anew from the time of the new promise, or cessation of the operation of such fact." In Ferris v. Barlow, 8 Vt. 90, it was held that the imprisonment of the debtor on execution, being in law a satisfaction of the judgment, suspended the running of the statute so long as the imprisonment continued, and that the statute only commenced to run anew from the time of the discharge of the judgment debtor from prison. While the presumption of payment continues, the plaintiff's right of action is suspended. When it is determined by proper proceedings that payment has not been made or is unavailing under the law, the statute begins to run from the date of such determination.

In discussing the effect of a levy of an execution on personal property, it is said in 2 Freeman on Judgments, fourth edition, section 475: "None of the decisions assume that a levy pro-

duces any absolute satisfaction. It is a satisfaction sub modo; the levy must be fairly exhausted before further proceedings can be taken, and while these proceedings are going on the plaintiff cannot have another execution, nor sue on the judgment, nor redeem lands under it. After the levy, if the sheriff wastes the property, or it is lost through his neglect or that of the plaintiff, the satisfaction is absolute. If, without any fault of the plaintiff or of the sheriff, the levy does not [440] produce proceeds sufficient to satisfy the execution, then the plaintiff is entitled to proceed for so much as remains unpaid as if no levy had been made." To the same effect are Peck v. Barney, 12 Vt. 72; Sheeran v. Sparhawk, 68 Vt. 604; 54 Am. St. Rep. 909; First Nat. Bank v. Rogers, 13 Minn. 407; 97 Am. Dec. 239; First Nat. Bank v. Rogers, 15 Minn. 381; M'Intosh v. Chew, 1 Blackf. 289; Green v. Burke, 23 Wend. 501; People v. Hopson, 1 Denio, 574; Mountney v. Andrews, Cro. Eliz. 237. From these authorities, it is clear that after a plaintiff has taken out his execution on a judgment and placed it in the hands of an officer for levy and satisfaction, he cannot maintain an action of debt on the judgment, while the officer is proceeding in due course to levy and satisfy the execution. Being thus barred of his right to maintain such action, the statute does not run during the time the right of action is thus suspended. If the execution is levied and duly returned, the statute begins to run on any unsatisfied balance, from the date of such return of the execution.

Hence, in the case at bar, the statute did not begin to run until March 25, 1889, and this action was brought within the time required by the statute.

Judgment affirmed with interest and costs, and case remanded to be proceeded with in respect to trustees.

JUDGMENTS—ACTIONS UPON—WHEN BARRED.—There was no positive limitation of an action on a judgment at common law, but such judgment, after twenty years, was presumed satisfied, unless the delay was sufficiently accounted for: Coombs v. Jordan, 3 Bland. 284; 22 Am. Dec. 236. A new action on a judgment of a magistrate's court cannot be brought until the expiration of the period during which execution may issue upon such judgment: Lee v. Giles, 1 Bail. 449; 21 Am. Dec. 476. Compare Simpson v. Cochran, 23 Iowa, 81; 92 Am. Dec. 410; Hummer v. Lamphear, 32 Kan. 439; 49 Am. Rep. 491. A debt due by judgment is not a contract within the statute of limitations of Kentucky: Dudley v. Lindsey, 9 B. Mon. 486; 50 Am. Dec. 522.

HAZEN *v.* LYNDONVILLE NATIONAL BANK.

[70 VERMONT, 543.]

INTENT—PRESUMPTION OF.—When an intelligent person does an act, the law presumes that in so doing he intends that the natural and legal consequences of his acts shall result.

RES JUDICATA.—A DECREE IN EQUITY DISMISSING A BILL WITHOUT PREJUDICE has no greater effect as res judicata than a voluntary nonsuft at law.

INJUNCTION AGAINST PROSECUTING A SUIT IN ANOTHER STATE OR COUNTRY.—The authority of a court of chancery to restrain persons within its jurisdiction from prosecuting suits in the courts of other states or of foreign countries is clear and indisputable.

INSOLVENCY LAW—ASSETS AFFECTED BY.—The insolvency law of Vermont is intended to embrace property of the insolvent situate in other states or countries and to distribute such property among his creditors, avoiding all preferences, and dissolving all attachments in favor of particular creditors made within a time specified before the adjudication.

INSOLVENCY LAWS—INJUNCTION AGAINST PROCEEDINGS IN OTHER STATES TO AVOID.—As against creditors residing in a state wherein proceedings have been, or are about to be instituted against an insolvent debtor, an injunction may properly issue to prevent them from maintaining actions or proceedings in other states to avoid the effect of the insolvency laws of their domicile by seeking preferences or advantages by attachment or otherwise in such other state.

NATIONAL BANKS.—AN INJUNCTION CANNOT ISSUE AGAINST A NATIONAL BANK before a final judgment in any suit, action, or proceeding in any state, county, or municipal court.

INSOLVENCY LAWS—PERSONAL LIABILITY OF RESIDENT CREDITORS FOR TAKING PROCEEDINGS IN ANOTHER STATE TO AVOID THE EFFECT OF.—If creditors of a debtor, known by them to be insolvent, institute an action in another state and there attach his property, and, during the pendency of the action, a suit is brought against them in the state of their domicile, by the assignee of the insolvent, to enjoin them from taking judgment, and they, to avoid such suit, assign the cause of action to a person resident in such other state, who is thereupon substituted as plaintiff, and procures judgment and sells thereunder the property so attached, such creditors are, in the suit brought against them by such assignee, answerable for the damages resulting from their proceedings.

INJUNCTIONS — PROCEEDINGS PENDENTE LITE TO AVOID THE EFFECT OF.—If a suit is brought to enjoin the prosecution of an action in another state, and the defendants, to avoid the effect of any injunction which may be issued, assign to a nonresident against whom any injunction which may issue must be inoperative, the court will do complete justice so far as as within its power, notwithstanding the attempted defiance of its authority, and to that end may compel the defendants to respond in damages.

INJUNCTION—DAMAGES INSTEAD OF.—Whenever a court of equity has jurisdiction to entertain a bill for an injunction against the commission or continuance of a wrongful act, it may award damages in substitution for such injunction, when the defendant, by his acts committed subsequently to the service of process upon him, has rendered relief by injunction ineffectual.

TRUSTEE.—ONE WHO PARTICIPATES WITH A TRUSTEE IN A BREACH OF HIS DUTY cannot hold the fruits of such default of duty as against the cestui que trust. Therefore, if a corporation selects as its agent the assignee of an insolvent to buy in his property at execution sale, and he buys it in at much less than its value, when he might have redeemed it or prevented the sale, such corporation can hold such property only for the purpose of indemnifying him for the amount so paid.

Henry C. Ide and Harry Blodgett, for the orators.

Smith & Sloane, for the defendants.

[546] THOMPSON, J. October 28, 1893, H. E. Folsom was an insolvent debtor, and had been for some time prior thereto. His insolvency was then known to the defendants. On the date named, a creditor's petition, praying to have Folsom adjudged an insolvent debtor, was filed in the court of insolvency for the district of Caledonia, and such proceedings were had thereon that he was regularly adjudged an insolvent debtor by that court, November 14, 1893. November 24, 1893, the orators were duly elected assignees of his estate, and accepted the trust, gave bonds for the faithful performance of the duties thereof, and were appointed as such assignees, and November 27, 1893, said court of insolvency assigned and conveyed to them all the estate, real and personal, of said debtor, except such as was by law exempt from attachment, together with all of his deeds, books, and papers relating thereto.

At the time of the filing of the petition in insolvency, Folsom was the owner of one share of stock in the Cimmaron Cattle Company of New Mexico, and November 25, [547] 1893, he executed and delivered an assignment thereof to the orators. In December, 1893, the Cimmaron Cattle Company was notified of the assignment of this stock to the orators, and entered a memorandum thereof on its books. From the time of such notice to the company, the stock was not subject to attachment under the laws of New Mexico, by the creditors of Folsom.

October 28, 1893, the defendant, the Lyndonville National Bank, held a note for one thousand dollars against H. E. Folsom and another note for four thousand dollars, indorsed by him, but signed by his brother, S. M. Folsom, of New Mexico, and October 31, 1893, it instituted in the district court for the county of Bernalillo in that territory a suit in its favor against

H. E. Folsom on the note for one thousand dollars, and a suit against him and S. M. Folsom on the note for four thousand dollars, and November 1, 1893, attached the stock in question in these suits, which were duly entered in said district court.

The original bill in the case at bar was served on the defendants, May 5, 1894, and the amended bill was filed February 25, 1895. This suit was brought after attempts by the orators at negotiation with the Lyndonville National Bank in respect to the attachment of the stock in New Mexico had failed.

The bank made service by publication, as required by law, for four weeks in New Mexico, against H. E. Folsom as an absent defendant, the first publication in the four thousand dollar suit being on May 12, 1894, and the first publication in the one thousand dollar suit being on May 15, 1894, in New Mexico papers. In June, 1894, it sold the two notes in question to A. B. McMillan, its attorney in the two suits, taking in payment therefor his note payable to itself at the Lyndonville National Bank, in six months from date, without interest, for five thousand dollars. The date of this note was a few days prior to June 25, 1894. The sale of the notes to McMillan was an actual and unconditional sale, the bank taking its chances of collecting the notes of McMillan whether he should collect [548] upon the suits by sale of the stock attached or not, and he taking his chances on his side of the trade of collecting the pay on the notes from a sale of the attached stock. At that time, not above three thousand dollars could have been collected by legal proceedings from McMillan, who resided in New Mexico. After June, 1894, the Lyndonville National Bank was not the owner and holder of the two notes sued upon, but McMillan was the owner and the holder thereof.

October 2, 1894, the Lyndonville National Bank filed in each of the suits brought by it its proof of publication of notice, and on the same day defaults were entered in each of the suits, against H. E. Folsom. October 9, 1894, McMillan filed in each of said suits a motion, verified by his affidavit, asking to be substituted as plaintiff therein, for the reason that after the commencement thereof and the publication of notice to the absent defendant, H. E. Folsom, the Lyndonville National Bank, for a valuable consideration, had sold and transferred the notes sued upon to him, and that he was then the owner and the holder thereof, and, on said motion, said district court ordered that McMillan be substituted as plaintiff in each of the suits in place of the bank, and thereupon final judgment was entered in his favor

as such substituted plaintiff in each of the suits, for the full amount of the notes sued upon, together with interest to date of judgment and costs. McMillan took out executions on said judgments and levied the same on the stock attached, and it was sold on execution, December 28, 1894, to satisfy said executions and costs thereon, for five thousand five hundred and seventy-six dollars and forty-nine cents.

Under the laws of New Mexico, McMillan had the right to be substituted as plaintiff as he was, and to proceed with the suits and obtain the same benefit from the attachment as though the same had been prosecuted in the name of the Lyndonville National Bank. The sale of the stock on the executions absolutely vested all title thereto in the purchaser under the laws of New Mexico.

At the time of the sale of the stock on execution, the 549 orator, L. D. Hazen, was the president of the Merchants National Bank, a creditor of H. E. Folsom, and he, by the direction of that bank, caused the stock to be bid off at the execution sale, for it, at the price named. At the time it was sold, the stock, with unpaid dividends, was worth twenty thousand dollars.

McMillan paid his note, or the renewal thereof, to the Lyndonville National Bank from the avails of the sale of the stock, January 11, 1895.

The debts now proved against H. E. Folsom's insolvent estate, amount to twenty-five thousand five hundred dollars. His assets which have come to the hands of the orators amount to about eight thousand dollars, beside any interest which they may have in the stock in question.

At the time of the bringing of this suit, the individual defendants were the officers of the defendant, the Lyndonville National Bank, and were such officers to and including the time of the sale of the notes to McMillan, and during all that time they and the orators were and now are resident citizens of Vermont. The Lyndonville National Bank is a national bank, located and doing business at Lyndonville in this state, and, for the purposes of this suit, is to be considered a citizen of Vermont: 25 U. S. Stats. at Large, 433; Petri v. Commercial Nat. Bank, 142 U. S. 644.

The master further finds that in making the attachment of the stock, and in the sale of the notes to McMillan, the defendants had the intent which is to be legally presumed from their acts.

The individual defendants admit in their answer that they

directed the suit to be brought in which the stock was attached. Neither of the defendants took any steps to discontinue any of the suits in New Mexico.

The master finds that at the time the suits were brought in New Mexico, the Lyndonville National Bank knew that insolvency proceedings against H. E. Folsom were imminent, and that this fact was known to its cashier, the defendant, L. B. Harris, when he went to New Mexico and instituted [550] the suits for it under instructions from the defendants to do so if he thought best. It is clear from the master's report that all the defendants must have then known of Folsom's financial condition at that time. The finding of the master in respect to the intent of the defendants must be construed to be a finding that they attached the stock to prevent its coming into the hands of the orators as assignees and to obtain an advantage over the other creditors of H. E. Folsom, and that they sold the notes to McMillan for a like purpose, and to defeat the purpose for which this suit of the orators was brought. When an intelligent person does an act, the law presumes that in so doing he intends that the natural and legal consequences of his act shall result: Lawson's Presumptive Evidence, 262; Holmes v. Holmes, 37 Conn. 278; 9 Am. Rep. 324; Keyser v. Rice, 47 Md. 203; 28 Am. Rep. 448; Larkin v. Hapgood, 56 Vt. 597.

The suit in equity brought in New Mexico by the Merchants National Bank against McMillan and the sheriff, to enjoin the sale of the stock on the executions, to which it is claimed that the orators became parties as intervening petitioners, does not in any way affect the rights of the parties to this litigation, for the reason that the defendants were not parties to that suit, and for the further reason that it was dismissed without prejudice, after the orators and so-called intervening petitioners in that suit had filed a notice that it would not be further prosecuted and that it might be dismissed without prejudice to any of their rights, respectively, in the premises. Standing thus, the suit was in effect dismissed for want of prosecution, which in an equity suit is no more than a nonsuit: Porter v. Vaughn, 26 Vt. 624. A decree in equity dismissing the bill without prejudice only puts an end to the suit then pending, and is not a bar to a subsequent suit for the same cause of action: Story's Equity Pleading, 8th ed., sec. 793; Mitford and Tyler's Pleading and Practice in Equity, 330; Seymor v. Nosworthy, 1 Cas. Ch. 155; note to Lea v. Lea, 96 Am. Dec. 778; County of Mobile v. Kimball, 102 U. [551] S. 705; House v. Mullen, 22 Wall. 42; Durant

v. Essex Co., 7 Wall. 107; Foote v. Gibbs, 1 Gray, 412; Cooper's Equity Pleading, 270; 1 Smith's Chancery Practice, 2d Am. ed., 222. It has the effect only of a nonsuit in an action at law.

Upon the facts stated, this court is called upon to determine whether the orators were entitled to the relief prayed for in their original bill, when process in this suit was served on the defendants, and, if so, whether that right has been defeated by the acts of the defendants and the suits in New Mexico in favor of the Lyndonville National Bank, and, if not thereby defeated, to what relief the orators are entitled by reason of the course pursued by the defendants since the commencement of this suit. The prayer of the orators' original bill was that the defendants might be ordered to discontinue their New Mexico suits, and dissolve their attachment of the stock and to release all claim thereto by reason thereof, and that they might be enjoined from further proceeding with said suits and attachment and from enforcing any judgments rendered in those suits against the stock, and for general relief.

The authority of the court of chancery to restrain persons within its jurisdiction from prosecuting suits either in the courts of this state or of other states or foreign countries, is clear and indisputable. The rule of law on this subject is clearly stated in Dehon v. Foster, 4 Allen, 550, by Bigelow, C. J., and is this: "In the exercise of this power, courts of equity proceed not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others and are therefore contrary to equity and good conscience. As the decree of the court in [552] such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country. If the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting or carrying on proceedings in a court of this state, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court. All that is necessary to sustain jurisdiction in such cases is, that the plaintiff should show a clear equity, and that the defendant should be subject to the

authority and within the reach of the process of the court": Bank of Bellows Falls v. Rutland etc. R. R. Co., 28 Vt. 470; Vermont etc. R. R. Co. v. Vermont Cent. R. R. Co., 46 Vt. 792; Cole v. Cunningham, 133 U. S. 107; 3 Lead. Cas. Eq., 3d Am. ed., 272, 201; 3 Pomeroy's Equity Jurisprudence, sec. 1318; 2 Story's Equity Jurisprudence, sec. 899; Keyser v. Rice, 47 Md. 203; 28 Am. Rep. 448; Cunningham v. Butler, 142 Mass. 47; 56 Am. Rep. 657; 1 High on Injunctions, 2d ed., sec. 106.

As the defendants in the case at bar are citizens and residents of this state, the court of chancery has jurisdiction over them in the premises.

The purpose of the insolvency laws of this state is to take and distribute all the property of the debtor, except that exempt by law from attachment, equally among his creditors. To this end it avoids all preferences, and dissolves all attachments, in favor of particular creditors, made within a specified time before the adjudication of insolvency, so that all the property of the debtor, except that which is exempt from attachment, may come into the hands of the assignees. It extends to all his property and assets, wherever situated. That it was intended to embrace property in other states and countries is shown by the provisions of Revised Laws of 1843, now reproduced in V. S. 2125, which reads as follows: "The debtor shall, at the expense of the estate, make and execute such deeds and writings, and indorse such bills, notes, and such other negotiable [553] papers, draw such checks and orders for moneys deposited in banks or elsewhere and do such other lawful acts and things as the assignee at any time reasonably requires, and which may be necessary to confirm the assignments, and enable the assignee to demand, recover, and receive the estate and effects so assigned, especially any part thereof which is without the state."

The judge of the court of insolvency is required, by an instrument under his hand and official seal, to assign and convey to the assignee the estate, real and personal, of the debtor, except such as is by law exempt from attachment, with his deeds, books, and papers relating thereto, and such assignment vests in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him, at the time of the filing of the petition in insolvency: Rev. Laws, 1818; V. S. 2096; Rev. Laws, 1820; V. S. 2098. The assignment, by operation of law, related back to the date of the filing the petition.

It is self-evident that the attachment of this stock by the

defendants in New Mexico would defeat the operation of this law in its most essential features by preventing a portion of H. E. Folsom's property from coming to the orators, as his assignees, to be equally distributed among his creditors. It would give the defendants a preference by which they would obtain payment of their debts in full to the detriment of the other creditors of the debtor. It is to be borne in mind that this is not a controversy between the orators and creditors of the debtor who are citizens of New Mexico, or some other state, and no question as to the rights of such creditors is involved. The assignment of the debtor's estate to the orators, by the judge of the court of insolvency, conveyed title to the stock to them as against the debtor and all his creditors who were citizens of this state and resident therein. The attachment of the stock by the defendants was an attempt by them to defeat the 554 operation of its laws, to the injury of the other creditors of the insolvent. This was manifestly contrary to equity and good conscience. The defendants were bound by the laws of this state. And clearly, on the facts charged in the bill and found by the master, the orators in equity were entitled, at the time their original bill was served on the defendants, to an injunction against them, enjoining them from prosecuting their attachment against the stock by their suits in New Mexico and from taking any benefit therefrom as against the orators: Cole v. Cunningham, 133 U. S. 107, and cases there cited in the opinion of the court; Moran v. Sturges, 154 U. S. 272; Cunningham v. Butler, 142 Mass. 47; 56 Am. Rep. 657; Bank v. Railroad Co., 28 Vt. 470; Vermont etc. R. R. Co. v. Vermont Cent. R. R. Co., 46 Vt. 792; Keyser v. Rice, 47 Md. 203; 28 Am. Rep. 448; Dehon v. Foster, 4 Allen, 550; Kendall v. McClure Coke Co., 182 Pa. St. 1; 61 Am. St. Rep. 688; Hayden v. Yale, 45 La. Ann. 362; 40 Am. St. Rep. 232; Allen v. Buchanan, 97 Ala. 399; 38 Am. St. Rep. 187; note to Newton v. Bronson, 67 Am. Dec. 95. Other authorities might be cited, were it necessary, but this holding is in accord with the great weight of authority. It is also in accord with the holding of this court in Crampton v. Valido Marble Co., 60 Vt. 291.

In the original bill of the orators there was no prayer for a preliminary injunction and none was granted. A preliminary injunction, if asked for, could not have been granted because the defendant really sought to be enjoined was a national bank. The United States Revised Statutes, 5242, in relation to national banks, provides that no injunction shall be issued against

such a bank, before final judgment in any suit, action, or proceeding in any state, county or municipal court: Pacific Nat. Bank v. Mixter, 124 U. S. 721.

Before selling the notes to McMillan, the defendants did not discontinue the suits in New Mexico, thus releasing the attachment of the stock. With the right of McMillan to be substituted as plaintiff in those suits under the law of New Mexico, the defendants in effect sold to him the suits with [555] the attachment of the stock, as well as the notes. They did this with the intent and for the purpose of obtaining a preference over the other creditors of the insolvent debtor and to prevent the stock from coming into the hands of the orators as a part of the assets of his estate, and to defeat the effect of a final judgment in this suit in favor of the orators, granting them the perpetual injunction in the premises to which they were entitled. The defendants now contend that the sale of the notes to McMillan, and the sale of the stock on execution in the New Mexico suits, constitute an effectual bar to any recovery or decree against them in this action, and in support of this contention they invoke the provision of article 4, section 1, of the constitution of the United States, which requires full faith and credit to be given in each state to the judicial proceedings of every other state. The reply to this claim is, that no question is made as to the conclusiveness of the judgments of the court in New Mexico, nor is it sought in this proceeding to attack them directly or collaterally. This bill is brought to compel the defendants, citizens of this state, to respect and obey its laws and the power of its courts to protect the rights of its citizens.

Under the laws of this state, the rights of the parties to this litigation, whatever they were, were fixed when it was begun and process served therein on the defendants. After such service, it was not in the power of the defendants to divest the orators of their rights without their consent, or the action of the court. The defendants might and did render the remedy to be administered more difficult, but the right itself remained unaffected by their acts. It is a fundamental principle that the rights of parties in the subject matter of litigation are to be determined as of the date of the commencement of the suit. After the court of chancery has taken cognizance of a cause, and by service of process therein upon the defendant has authentically informed him of the redress sought to be enforced against him, it will not [556] permit him to trifle with it by disqualifying himself from obeying its final decrees therein. Under such circumstances, a defendant proceeds at his peril, and the court will do complete justice, so far as it is within its power, not-

withstanding the attempted defiance of its authority by the defendant. The granting or refusing a preliminary injunction in no way affects the rights of the parties in respect to the final judgment: Wing v. Fairhaven, 8 Cush. 363; Charles River Bridge v. Warren River Bridge, 6 Pick. 376; Gibbens v. Peeler, 8 Pick. 254; Florence Sewing Machine Co. v. Grover etc. Sewing Machine Co., 110 Mass. 16; Texas v. Hardenberg, 10 Wall. 68.

The cases cited by the defendants in support of their contention that the sale of the notes and also of the stock on execution, as a matter of law, defeats this action of the orators, are clearly distinguishable from the case at bar, and if they were not, they are contrary to the law of this state and therefore not to be followed by this court.

The purpose of the orators' bill was to enable them to secure the stock in question for the benefit of the creditors of H. E. Folsom, and this purpose would have been accomplished had an injunction such as they were entitled to have on the facts found been granted them as of the date of the service of process in this suit, upon the defendants. By reason of the acts of the defendants committed since the service of process upon them, an injunction would now furnish them no relief. Whenever a court of equity has jurisdiction to entertain a bill for an injunction against the commission or continuance of a wrongful act, it may award damages in substitution for such injunction, when the defendant by his acts committed subsequent to the service of process upon him has rendered relief by injunction ineffectual: Hayden v. Yale, 45 La. Ann. 362; 40 Am. St. Rep. 232; 2 Story's Equity Jurisprudence, 6th ed., sec. 794; Nelson v. Bridges, 2 Beav. 239; 1 Pomeroy's Equity Jurisprudence, secs. 236-240, and note 3 to sec. 237; Milkman v. Ordway, 106 Mass. 232; Greenway v. [557] Adams, 12 Ves. Jr., Sumner's ed., 395; Woods v. Scott, 14 Vt. 518; Stimpson v. Putnam, 41 Vt. 238.

The orators by the amendment to their original bill have so framed it as thereunder to entitle them to substituted relief in the way of pecuniary damages.

It is contended that the orators should have a decree for twenty thousand dollars, the value of the stock at the time of its sale on execution, and interest thereon from that date. This contention would be sound, were it not for the connection of the orator, Hazen, with the sale, and his duty as assignee in relation thereto. It was his duty as assignee to protect the insolvent estate, so far as it was in his power to do so, from the sacrifice of its assets, including this stock. It appears that

about eight thousand dollars of assets had come into the hands of himself and his coassignee. It was then provided by Revised Laws of 1821, now V. S. 2103, that an assignee might redeem liens upon the goods or estate of the debtor, by order of the court of insolvency. Had he applied for such an order and it had been refused, he would have been exonerated from further duty to protect this stock from the attachment lien, but it does not appear that he applied for such an order, or did anything to save the stock for the insolvent estate, except to bring this suit at bar against the defendants. It was his duty to obtain such an order if he could. When the value of the stock, in comparison with the amount of the executions on which it was sold, is considered, it is not to be presumed that he could have obtained it. The Merchants' National Bank, when it sent him, as its president, to New Mexico to purchase the stock for it at the sale, knew the fiduciary relation in which he stood in respect to the stock as an asset of the insolvent estate. He caused the stock to be bid off for the bank at a sum fourteen thousand four hundred and twenty-three dollars and fifty-one cents less than its then value. By making the assignee its agent in this transaction, with full knowledge of his fiduciary relation to the insolvent estate, including this stock, the bank cannot now hold the stock as against the estate, after [558] being reimbursed for the money it paid for it, with interest thereon. One who participates with a trustee in the breach of his duty cannot hold the fruits of such default of duty as against the cestui que trust. Standing thus, although the defendants were also in the wrong, the orators can only recover the sum for which the stock was sold, with interest thereon from the date of the sale, as damages.

Pro forma decree reversed and cause remanded, with directions to enter a decree against all the defendants for the sum of five thousand five hundred and seventy-six dollars and forty-nine cents, with interest from December 28, 1894, with costs of suit.

Start and Taft, JJ., dissent.

EVIDENCE—PRESUMPTION OF INTENT.—Every sane man is presumed to intend the ordinary and probable consequences of any act that he purposely does: State v. Levelle, 34 S. C. 120; 27 Am. St. Rep. 799, and note.

INJUNCTION AGAINST PROSECUTION OF ACTION IN ANOTHER STATE.—A court of equity in one state has power to restrain its own citizens, of whom it has jurisdiction, from prosecuting suits in the courts of other states and foreign jurisdictions, whenever the facts of the case make such restraint necessary to enable the court to do justice and prevent one citizen from obtaining an inequitable advantage over other citizens: Note to Kendall v.

McClure Coke Co., 61 Am. St. Rep. 692; Miller v. Gittings, 85 Md. 601; 60 Am. St. Rep. 352, and note.

INJUNCTION AGAINST INTERFERENCE WITH INSOLVENCY PROCEEDINGS BY ACTIONS IN FOREIGN JURISDICTIONS.—Where the statutes of a state or country authorize proceedings in insolvency by or against a debtor, the result of which is the transfer of all his property subject to execution to an assignee or receiver, which transfer also has the effect of annulling preferences made or obtained in anticipation of insolvency and of enabling all the creditors within the state to share in the distribution of the assets of the insolvent, the courts of the state or country may enjoin a resident creditor from proceeding with actions commenced elsewhere for the purpose of obtaining an advantage or preference over other creditors, whether such actions were begun after the commencement of the insolvency proceedings or before that date, in anticipation of the commencement of such proceedings, and for the purpose of enabling the creditor to appropriate to the satisfaction of his debt more than his just share of the assets of the insolvent: See monographic note to Eingartner v. Illinois Steel Co., 59 Am. St. Rep. 881.

TRUSTS—PURCHASER WITH NOTICE FROM TRUSTEE.—A purchaser from a trustee with notice takes the property impressed with the trust, and his position is in no respect better than that of his vendor. He is chargeable with the execution of the trust: See monographic notes to Day v. Brenton, 63 Am. St. Rep. 469, and Tyler v. Herring, 19 Am. St. Rep. 267.

ISHAM *v.* DOW.

[70 VERMONT, 588.]

PROXIMATE CAUSE OF INJURY—WHAT IS.—If a person unlawfully, wantonly, and maliciously shoots at a dog, intending to kill it, but not knowing whether he will do so or not, and not knowing what will happen if he does not, and the dog, being hurt, but not instantly killed, runs to his master's house in close proximity, enters it through an open door into a room where is his owner's wife, rushes violently and forcibly against her, and knocks her down and injures her, the shooting of the dog is the proximate cause of her injury, and a recovery therefor may be had against the wrongdoer.

WANTON ACTS—LIABILITY FOR.—If an injurious act is wanton, the doer of it is liable for all consequences, however remote, because the act is quasi criminal in character, and the law conclusively presumes that all consequences were foreseen and intended.

DAMAGES.—FOR A VOLUNTARY WRONGFUL act the doer is answerable for any injury that may happen by reason thereof, whether by accident or carelessness.

NEGLIGENCE, LIABILITY FOR, TO WHAT EXTENDS. Negligence imposes liability for all the injurious consequences which flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice.

Seneca Haselton and J. E. Cushman, for the plaintiff.

W. L. Burnap and Henry Ballard, for the defendant.

[589] ROWELL, J. Dow, the intestate, a poor gunner, as he knew, with eyesight much impaired, knowing that the plaintiff and her children were alone in her husband's house, unlawfully, wantonly, and maliciously shot at and wounded her husband's dog, lying peaceably in close proximity to the house on the land of a third person, whereupon the dog sprang up, rushed wildly and rapidly toward the house, entered it through an open door into the room where the plaintiff was, ran violently and forcibly against her, [590] knocking her down and injuring her; and the question is, whether the estate is liable for it.

The defendant says that in order to recover the plaintiff must establish two things, namely, negligence on the part of Dow, and that her injury resulted proximately therefrom, and that the case shows neither, as it does not show that Dow owed her any legal duty, nor that his act was the proximate cause of the injury.

But we cannot adopt this view. The intestate unlawfully, wantonly, and maliciously shot at the dog, intending, we will assume, to kill it, but not knowing whether he would or not, and not knowing what would happen if he did not, and by his wanton act the dog was set wildly in motion, and that motion, thus caused, continued, without the intervention of any other agency, and without power on his part to control it, until the plaintiff's injury resulted therefrom. In these circumstances the law treats the act of the intestate as the proximate cause of the injury, whether the injury was, or could have been, foreseen or not, or was or was not the probable consequence of the act, for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events.

This is the universal rule when the injurious act is wanton. In 16 American and English Encyclopedia of Law, 434, the true principle is said to be that he who does such an act is liable for all the consequences, however remote, because the act is quasi criminal in its character, and the law conclusively presumes that all the consequences were foreseen and intended. But it is not necessary in this state, certainly, that the act should be wanton in order to impose liability for all the injurious consequences. If it is voluntary and not obligatory it is enough. In Vincent v. Stinehour, 7 Vt. 66, 29 Am. Dec. 145, it is said that for such an act the doer is answerable for any injury that may happen by reason thereof, whether by accident or carelessness. In Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496, the defendant

591 shot at a fox that the plaintiff's dog had driven to cover, and accidentally hit the dog, and he was held liable, because the shooting at the fox was voluntary, and furnished no excuse for hitting the dog, though he did not intend to hit him. The same rule was applied at nisi prius without exception in Taylor v. Hayes, 63 Vt. 475, where the defendant shot at a partridge and accidentally hit a cow. So in Bradley v. Andrews, 51 Vt. 530, the defendant voluntarily discharged an explosive missile into a crowd and hurt the plaintiff, and it was held that as the act was voluntary and wrongful, the defendant was liable, and that his youth and inexperience did not excuse him.

The rule is the same here in negligence cases, and may be formulated thus: When negligence is established, it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But in administering this rule, care must be taken to distinguish between what is negligence and what the liability for its injurious consequences. On the question of what is negligence, it is material to consider what a prudent man might reasonably have anticipated; but when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability. This is all well shown by Stevens v. Dudley, 56 Vt. 158, and Gilson v. Delaware etc. Canal Co., 65 Vt. 213; 36 Am. St. Rep. 802. The rule is the same in England, as will be seen by referring to the leading case of Smith v. London etc. Ry. Co., L. R. 6 Com. P. 14, in the exchequer chamber. In Sneesby v. Lancashire etc. Ry. Co., L. R. 1 Q. B. Div. 42, a herd of plaintiff's cattle were being driven along an occupation road to some fields. The road crossed a siding of the defendant's railway on a level, and when the cattle were crossing the siding defendant's servants negligently 592 sent some trucks down the siding amongst them, which separated them from the drovers and so frightened them that a few rushed away from the control of the drovers, fled along the occupation road to a garden some distance off, got into the garden through a defective fence, and thence on to another track of the defendant's railway and were killed; and the question was, whether their death was not too remote from the negligence to impose liability. The court said that the result of the negligence was twofold: 1. That the trucks separated the cattle; and 2. That the cattle were frightened and became infuriated

and were driven to act as they would not have done in their natural state; that everything that occurred or was done after that must be taken to have occurred or been done continuously; and that it was no answer to say that the fence was imperfect, for the question would have been the same had there been no fence there. Then liability was made to depend, not on the nearness of the wrongful act, but on the want of power to divert or avert its consequences; and it continued until the first impulse spent itself in the death of the cattle: See Ricker v. Freeman, 50 N. H. 420; 9 Am. Rep. 267; Alabama etc. R. R. Co. v. Chapman, 80 Ala. 615.

Ellis v. Cleveland, 55 Vt. 358, is not in conflict with the Vermont cases above cited, as is supposed, for there there was no causal connection between the wrongful act and the injury complained of, and so there could be no recovery. As illustrative of nonliability for damage flowing from an intermediate and independent cause operating between the wrongful act and the injury, see Holmes v. Fuller, 68 Vt. 207.

Ryan v. New York Cent. R. R. Co., 35 N. Y. 210, 91 Am. Dec. 49, is relied on by the defendant. Pennsylvania R. R. Co. v. Kerr, 62 Pa. St. 353, 1 Am. Rep. 431, is a similar case. It is said in Milwaukee etc. R. R. Co. v. Kellogg, 94 U. S. 474, that these cases have been much criticized; that if they were intended to hold that when a building has been negligently [593] set on fire, and a second building is fired from the first, it is a conclusion of law that the owner of the second has no remedy against the negligent wrongdoer, they have not been accepted as authority for such a doctrine even in the state where they were made, and are in conflict with numerous cases in other jurisdictions. Judge Redfield says in 13 American Law Register, New Series, 16, that these cases have not been countenanced by the decisions in other states. And Judge Cooley says that a different view prevails in England and most of the American states; that the negligent fire is regarded as a unity; that it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first, though if it had been stopped on the way and started again by another person, a new cause would thus have intervened, back of which any subsequent injury could not be traced; that proximity of cause has no necessary connection with contiguity of space nor nearness of time: Cooley on Torts, 1st ed., 76.

Judgment reversed and cause remanded.

NEGLIGENCE—WANTON—WILLFUL INJURY—WHAT CONSTITUTES.—To constitute willful injury there must be design, purpose, and intent to do wrong and inflict injury; while to constitute wanton negligence, the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surroundings, circumstances, and existing conditions, that his conduct will naturally or probably result in injury: Louisville etc. R. R. Co. v. Anchors, 114 Ala. 492; 62 Am. St. Rep. 116.

NEGLIGENCE — LIABILITY FOR — PROXIMATE CAUSE. There can be no recovery for negligence unless the injury complained of was the natural and probable result of it, and the attendant circumstances were such that a person of ordinary care ought reasonably to have apprehended that the injury might result from the negligence: Maitland v. Gilbert Paper Co., 97 Wis. 476; 65 Am. St. Rep. 137. The negligence must have been the proximate cause of the injury: Brotherton v. Manhattan Beach Imp. Co., 48 Neb. 563; 58 Am. St. Rep. 709, and note. But if the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to others, and actually results in injury, through the intervention of other causes not wrongful, the injury must be referred to the wrongful cause: Wood v. Pennsylvania R. R. Co., 177 Pa. St. 306; 55 Am. St. Rep. 728, and note. **See monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 807, on proximate and remote cause.**

STATE *v.* THERIAULT.

[70 VERMONT, 617.]

CONSTITUTIONAL LAW — STATUTE DEPRIVING A LANDOWNER OF HIS RIGHT TO FISH ON HIS OWN PREMISES.—A statute authorizing the fish commissioners of a state to place fish in a pond or stream, and thereupon to prohibit all fishing therein for three years, is not unconstitutional, though construed so as to prevent an owner of land from fishing in a stream constituting a part thereof during the time involved in such prohibition. It is not a destruction, but a regulation, of his right.

FISH DO NOT BELONG TO THE OWNER OF THE SOIL covered by the water in which they are, though he may have a sole and exclusive right to fish therein. His property in them is qualified and can be rendered absolute only by their capture.

FISH.—THE RIGHT TO TAKE FISH FROM FLOWING WATERS, nonboatable, pertains solely to the owner of the lands through which such waters flow. It pertains to him personally and is a private right, but he does not own such flowing water and has only the right to use it properly while on its passage. Other landowners on different parts of the stream also have the right to take fish therefrom, and this right carries with it the common right to have fish inhabit and spawn in the premises, and for this purpose to have a common passageway to and from their spawning and feeding grounds.

CONSTITUTIONAL LAW—FISH.—A state may, by statute, authorize its officers to go upon a stream, nonboatable and running through the lands of a private proprietor, and stock it with fish, whether he consents or not.

John H. Senter, for the respondent.

F. A. Howland, state's attorney, and F. L. Fish, for the state.

[618] ROSS, C. J. The respondent excepted to the judgment of the city court of the city of Montpelier holding, on demurrer, the complaint of the state's attorney sufficient. The complaint is in three counts. They all charge him with illegally fishing in a stream known as Hale's brook on land owned [619] by George Hale in the county of Washington, which brook flows into the Winooski river, a boatable stream. Each count alleges that the brook had been stocked with trout by the fish and game commissioners, and duly posted and advertised agreeably to V. S. 4568. The first count alleges that this was done with the consent of George Hale, the owner of the land over which the brook flows. The other two counts do not allege any such consent.

V. S. 4568 reads: "When the fish and game commissioners place fish in a pond or stream, they may prohibit fishing therein, or in specified portions thereof, for a period not exceeding three years, by posting notices to that effect conspicuously upon the banks thereof, and publishing such notice three weeks successively in a newspaper published in the county where such waters are located; if a person fishes, or attempts to fish, in such waters within the time specified, he shall be fined fifty dollars, if prosecution is commenced within six months after the offense is committed." V. S. 4567 reads: "Waters stocked by the fish and game commissioners shall thereafter be treated as public waters, but any person who might otherwise make the same a private preserve or posted waters, may do so at the expiration of five years from the date of filing, with the fish and game commissioners, a written notice of his intention so to do." By V. S. 4565, the fish and game commissioners are authorized, at the expense of the state, among other things, to introduce trout, shad, salmon, and other good varieties of fish into such streams, lakes, and ponds within the state, not private preserves or posted waters, as they deem suitable to the successful cultivation of fish. V. S. 4562 defines "private preserve," "posted waters," and "public waters," as follows: "Private preserve; a natural pond, of not more than twenty acres, belonging to a common owner, or any artificial pond made solely for the purpose of fish culture." "Posted waters; all waters on lands posted as provided in this chapter." "Public waters; all waters of which the [620] state has jurisdiction, except private preserves and posted waters." Elsewhere in the same chapter it is provided that

the owner or occupant of inclosed or cultivated land may, by posting notices as thereby required, prohibit shooting, trapping, or fishing thereon, under a prescribed penalty. These are the main provisions of the statute bearing upon the section brought under consideration. There are provisions establishing a "close season" for hunting and fishing, or a time in the year when all persons are prohibited from hunting and fishing, and also regulating the manner and means by which hunting and fishing shall be prosecuted in the open season. These statutes express the legislative will regulating the rights of riparian owners in regard to taking fish from a common stream, and make the fish and game commissioners officers to carry that will into execution. This is shown by the decision hereinafter cited, and by all authorities. The respondent does not contend otherwise.

The respondent contends that V. S. 4568 is unconstitutional, in that it deprives the owner of the land over which the brook flows of his exclusive right to catch fish therein for the period of three years, and then makes them public waters for at least five years longer, without compensation. This is his only contention. Without considering whether the respondent, being a stranger to the right to fish in this brook, can raise this question, we will pass to the consideration of the broader question, which alone has been argued, whether the statute is unconstitutional as regards the owner of the soil, to whom the right to fish attaches. There can be no doubt that if this deprivation of the owner of the soil over which the brook flows of the right to fish in it for the time specified is the taking of private property for public use, the law must, as to him, be held unconstitutional.

Article 2, chapter 1, of the constitution of Vermont provides: "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever [621] any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." If the act infringes this constitutional provision, the legislature had no authority to enact it, and it is without legal validity. But this provision of the constitution must be read in connection with its other provisions, and especially must be considered with article 5, chapter 1, of the constitution of Vermont, which declares: "That the people of this state, by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same"; and section 40 of chapter 2 of the constitution of Vermont, reading: "The inhabitants of this state shall have liberty, in seasonable times, to hunt and fowl

on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations to be hereafter made and provided by the general assembly." Hence, the question for consideration is, whether the act of the fish and game commissioners, definitely and specifically authorized and performed by and under V. S. 4568, is a taking of a right belonging to the owner of the land over which the brook flows, for the use of the public; or whether it is a regulation of his use of that right, under section 40 of chapter 2 of the constitution of Vermont, and an exercise of the right of governing and regulating the internal police of the people of the state, reserved to their representatives by article 5, chapter 1, of the constitution of Vermont.

In considering this question, it is necessary to keep in mind the nature of the right and of the property out of which it arises. The right to take fish from flowing waters, not boatable, in this state, pertains solely to the owner of the land through which such waters flow. It pertains to such owner personally and is his private right; but he does not own such flowing water and only has the right properly to use it while on its passage. He can use it in a reasonable [622] manner for domestic purposes, for creating power and for taking fish therefrom. He must not divert it from its course, nor pollute it, but leave it so that the landowners on the stream above and below him can enjoy their full like use of the water, and, among these, the right to take fish from the stream. This right implies and carries with it the common right to have fish inhabit and spawn in the stream. For his purpose they must have a common passageway to and from their spawning and feeding grounds. Fish themselves are ferae naturae, the common property of the public, or of the state, in this country. From this common property, the owner of the soil over which the nonboatable stream flows has the right to appropriate such as he may capture and retain; but this right of capture and appropriation is subject to regulation and control by the representatives of the people, so that there shall continue to be a common property. The preservation of the common property, and its increase by the introduction of new and better species of fish, is not a taking away of the right of the owner of land on the stream to appropriate therefrom, but a preservation or enlargement of such right. The state, the representative of the people, the common owner of all things ferae naturae, not only has the right, but is under a duty, to preserve and increase such common property. Such is declared to be the duty of

the representatives of the people in the articles and sections of the constitution of Vermont referred to. Such, also, was the common-law view of the nature of the rights of persons in streams and in animals ferae naturae. Says Mr. Justice Blackstone, in his Commentaries, book 2, page 14: "But after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain common; being such wherein nothing but an usufructuary property is capable of being had; and, therefore, they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among [623] others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such, also, are the generality of those animals which are said to be ferae naturae or of a wild and untamable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but, if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterward." The same writer treats more fully of this class of common property and of the rights of individuals therein in chapter 25 of the same book, and there lays down the principle that an individual may acquire or have a qualified property in such animals, among which fish are classed, either because of his industry in capturing and retaining them, or on account of their inability, for the time being, to escape from his premises or control, like young game birds while in the nest, or on account of his special right or privilege of capturing and killing them in exclusion of other persons. This latter right does not exist in this country, except as limited by ownership of the place from which they are taken and the right to exclude others therefrom.

Not a decision in this country, state or national, has been brought to our attention by the respondent, nor by quite an extensive examination of such cases, which holds that such acts of the state legislature, in regard to this class of property and in restraint of the right of the riparian owner to take and appropriate fish therefrom, are unconstitutional. They have uniformly been held to be not a taking of private property or private rights for public use, for which compensation must be made, but an exercise of the police power of the state to preserve or increase a common property, and to regulate the right to capture

and appropriate therefrom so as to preserve and increase the [624] common property, or, at least, to prevent its diminution or destruction. Many cases might be cited in support of what has thus far been said. I quote from but a few. In Peters v. State, 96 Tenn. 682, the plaintiff in error owned a tract of land covered by water, from which he alone had the right to take fish. The water was not a stream through which other riparian owners had the right to have fish pass to and from their feeding and spawning grounds. An act limiting his right to take fish therefrom only with rod or line was held constitutional, the court saying: "Fish in streams or bodies of water have always been classed by the common law as ferae naturae, in which the riparian proprietor or owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in said waters, has, at best, but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters: 2 Blackstone's Commentaries, 392; People v. Bridges, 142 Ill. 30. But, in addition, the power of the legislature to enact laws for the protection and preservation of game in the forest, and fish in the waters of the state, has been so frequently exercised, and when challenged on constitutional grounds has been so uniformly maintained, that the question has now passed beyond debate: Maney v. State, 6 Lea, 218; Lawton v. Steele, 152 U. S. 133; 38 L. C. P. ed. 385; Magner v. People, 97 Ill. 320; People v. Bridges, 142 Ill. 30; Tiedeman on Police Powers, secs. 125, 127." See, also, State v. Mrozinski, 59 Minn. 465; State v. Lewis, 134 Ind. 250; Ex parte Maier, 103 Cal. 476; 42 Am. St. Rep. 129, and note; 7 Am. & Eng. Ency. of Law, tit. Fish and Fisheries, 23; State v. Roberts, 59 N. H. 256; 47 Am. Rep. 199; New England Trout etc. Club v. Mather, 68 Vt. 338; Drew v. Hilliker, 56 Vt. 641. Lawton v. Steele, 152 U. S. 133, establishes the attitude of the supreme court of the United States in regard to the constitutionality of such laws, and that they are but police regulations within the powers of the states to exercise. [625] Townsend v. State, 147 Ind. 624; 62 Am. St. Rep. 477, is an interesting case upon the right of a state to enact a law regulating the use of natural gas. It treats it as common property, from which those who strike a vein upon their own lands have a right to draw, but subject to such statutory regulations as the law-making power of the state might enact in the exercise of its police power.

The police power extends to almost all kinds of property and rights, and its exercise by the legislative branch is almost un-

limited, except where taken away, or limited, by the state or national constitution. Courts and law writers have not attempted to define it with precision. It is the general power of the legislative branch to enact laws for the common good of all the people. All property and all rights are held in subjection to the exercise of this power, because all individual property and individual rights in every organized community are connected with, and related more or less intimately to, the individual property and individual rights of others. In the exercise of this power, criminal laws are enacted, laws relating to the support of the poor, to the education of the young people, to build and maintain highways; and, to accomplish these ends, the individual is often compelled to surrender a portion of his rights to property and sometimes his liberty.

In Livermore v. Jamaica, 23 Vt. 361, this court held that the taking of one's land for a public highway was not such a taking as required money compensation to be made therefor under the constitution, but that the benefit which he derived from the establishment of the highway might be offset to the damage he sustained from the taking. The court say: "The constitution is the paramount law of the land; and every statute which is in contravention of the constitution must be held inoperative and void. Whether the statute, or that section of it by which the commissioners were governed in making their appraisal, is repugnant to the constitution, must, we think, depend upon whether the [626] taking of land for a highway is such an appropriation of the property to public use as is contemplated by the constitution. The taking of land for a highway does not divest the owner of his title in fee. The public only acquire an easement, and the right of the owner to use, occupy, and control the land in any manner which is not inconsistent with the public enjoyment of the easement still remains. Upon a discontinuance of the highway the possession of the land reverts to the owner in as full and ample manner as he originally held it. In the opinion of the court, this is not such a taking of property for public use, in the sense of the constitution, as necessarily requires compensation for the same to be made in money. To bring a case within this provision of the constitution, it should be such a taking as divests the owner of all title to or control over the property taken, and is an unqualified appropriation of it to the public."

In Commonwealth v. Tewkesbury, 11 Met. 55, the owner of the fee of a portion of the beach which helps form Boston har-

bor was prosecuted for taking sand and gravel therefrom under a statute which made such taking a penal offense. He defended, and one ground was, that the statute was unconstitutional because it was a taking of his property for public use without making compensation. The court, in an opinion by Shaw, chief justice, held that although the statute prohibited such taking of sand and gravel with no limitation in regard to time, it was not such a taking of his property as required compensation under the constitution, but a regulation of his use of his own property, necessary, in the interest of the state, to protect the harbor of Boston, and therefore constitutional, and that the respondent was guilty.

The same power which may tax the people to establish and maintain good roads for the common benefit of the public may tax them and take measures to preserve and increase the common fund of game and fish, from which all [627] can take, subject to regulations prescribed by the legislature, in the exercise of this power. In Thorpe v. Rutland etc. R. R. Co., 27 Vt. 140, 62 Am. Dec. 625, and note, this court held that a law passed subsequently to the granting of the charter of the defendant—which this court held to be a contract—compelling the defendant to maintain, for all time, at a considerable expense, suitable fences on the sides of its railroad track, was a proper exercise of this power. That decision has been generally approved and followed. This power has been exercised in regard to almost every species of property and all kinds of rights. It is very elastic, and adjustable to new circumstances and new situations—as flexible and adjustable as the maxim, Sic utere tuo ut alienam non laedas, in which it has its origin.

In addition to the cases already cited, the following (which could be added to at pleasure) are good illustrations of the extent and application of this power: Champers v. Greencastle, 138 Ind. 339, 46 Am. St. Rep. 390, and note, in which it is said: "The police power of the state extends in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure, or tend to the comfort, prosperity, or protection of the community": People v. Wagner, 86 Mich. 594; 24 Am. St. Rep. 141, and note; People v. Ewer, 141 N. Y. 129; 38 Am. St. Rep. 788, and note; Butler v. Chambers, 36 Minn. 69; 1 Am. St. Rep. 638, and note; State v. Heinemann, 80 Wis. 253; 27 Am. St. Rep. 34, and note, in which the police power is defined as the power of "the state vested in the legislature to enact such wholesome and reasonable laws, not in conflict with the state or

federal constitution, as may be conducive to the common good": Health Department v. Rector, 145 N. Y. 32; 45 Am. St. Rep. 579, and note. The opinion in the last case is carefully prepared. Among other things, it says: "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for a compensation for such [628] disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing the general benefits which the regulations are intended and calculated to secure: Dillon on Municipal Corporations, 4th ed., sec. 141 and note 2; Commonwealth v. Alger, 7 Cush. 83, 84, 86; Baker v. Boston, 12 Pick. 184, 193, 22 Am. Dec. 421; Clark v. Mayor, 13 Barb. 32, 36." This was said in upholding a law which compelled the owner of a tenement block erected and in use before the passage of the law to introduce water at quite an expense, so it could be drawn from a faucet on every floor of the block: Commonwealth v. Kimball, 24 Pick. 359; 35 Am. Dec. 326, and quite extensive note; People v. Arensberg, 103 N. Y. 388; 57 Am. Rep. 741, and note.

The framers of the state constitution early began to regulate the right to kill deer and take fish and muskrats, for their protection and preservation for the common benefit of the people, and to destroy noxious wild animals, wolves and panthers, by the payment of bounties with money raised by enforced taxation. These were done by acts passed in March, 1797: 2 Tolman's Compiled Statutes, 19-24. The constitution in its present form was adopted in 1793. The act for the preservation of fish makes the erection of any dam, hedge, seine, fish garth, or other stoppage, in any watercourse, whereby navigation or the passage of fish may be obstructed, a nuisance, and punishes the person erecting the same with a fine. It also establishes a "close season" when trout cannot be taken.

The definition of public waters apparently excludes from the jurisdiction of the state private preserves and posted waters. This is not true. Both are subject to the police power of the state. Any man can be punished if he injures the rights of their owners. Posted waters obtain additional protection by an exercise of the police [629] power. At common law, the owner could only recover for a trespass upon his land and the invasion of his right of fishery—generally a very ineffectual remedy. Hence,

the right of the riparian owner was rarely regarded, or enforced before the legislature, to protect his right, allowed him, if he complied with the law in regard to posting his premises, to recover of every violator substantial damages. Where the owner availed himself of this law, the legislature evidently considered that the unreasonable destruction of the natural supply of fish in the trout brooks and streams would be stayed, and that such streams would need no further protection. Hence, such brooks are excluded from the jurisdiction of the fish and game commissioners. But it reasonably judged that a nonboatable stream, which the riparian owner would not be at the expense of posting, was already depleted of the natural supply of this valuable kind of food and needed to be replenished. It therefore allowed the fish and game commissioners to restock it at the expense of the people; and to make that expense profitable to such riparian owner and to the people of the state, the fish must be protected from destruction until they began to reproduce, and then the community should not be burdened, to protect his right beyond what the common law furnished, for five years longer. By providing that such waters should be waters over which the state has jurisdiction, it did not take away such riparian owner's rights to maintain trespass, against everyone who should enter without his license upon his premises and catch fish from the nonboatable stream thereon. The action of the fish and game commissioners in stocking the stream and posting it, presumably would inure to the benefit of such riparian owner and all other riparian owners on that and other connected streams. Whether it would or not, the constitution clearly empowered the legislature to pass such laws as, in its discretion, it might judge would be for the common benefit of the people of the state.

630 Some one has suggested that the state had no right to send the fish and game commissioners upon Mr. Hale's land to stock the stream. The law is paramount to his property and rights, within the inhibitions of the state and national constitutions. As well might he contend that the law could not send its officer upon his land to arrest him for a criminal act, or to attach his property at the suit of a creditor. On any view, even if the owner of the land over which the stream flows had been the violator of the law and was under prosecution, this statute must be held constitutional and enforceable; and much more against this respondent, who clearly had no right upon Mr. Hale's premises, nor the right to take fish from the stream of water flowing thereon.

Judgment affirmed and cause remanded to the city court.

Thompson, J., dissents.

FISHERIES—FISH IN NON-NAVIGABLE WATERS—PROPERTY RIGHTS IN—REGULATION BY STATUTE.—The right to fish in an unnavigable stream is in the owner of the soil to the exclusion of the public: Waters v. Lilley, 4 Pick. 145; 16 Am. Dec. 333; Hooker v. Cummings, 20 Johns. 90; 11 Am. Dec. 249; Beckman v. Kreamer, 43 Ill. 447; 92 Am. Dec. 146. But to complete the right of property in fish, an actual appropriation or mancupation must be made: Sollers v. Sollers, 77 Md. 148; 39 Am. St. Rep. 404. The right of property attaches only to those reduced to actual possession, and riparian proprietors have no right to kill or obstruct the free passage of fish not taken: People v. Truckee Lumber Co., 116 Cal. 397; 58 Am. St. Rep. 183, and note. One who owns all the land surrounding a natural pond having an outlet communicating with public waters is liable for taking fish from the pond out of the season prescribed by statute: State v. Roberts, 59 N. H. 256; 47 Am. Rep. 199; monographic note to Ex parte Maier, 42 Am. St. Rep. 138. See, also, Rogers v. Jones, 1 Wend. 237; 19 Am. Dec. 493. The state, representing the people, may regulate common rights and privileges of fishing, and an act of the legislature, intended to protect and further such rights, is valid: Moulton v. Libbey, 37 Me. 472; 59 Am. Dec. 57.

CASES

IN THE

SUPREME COURT

OF

WASHINGTON.

STATE *v.* BOARD OF EDUCATION.

[19 WASHINGTON, 8.]

SUPERSEDEAS WHERE NONE IS EXPRESSLY AUTHORIZED BY STATUTE.—Where a state constitution provides that the supreme court shall have power to issue certain enumerated writs and also all other writs necessary to the proper and complete exercise of its appellate and revisory jurisdiction, it is, by virtue of its inherent powers as an appellate tribunal, authorized to issue a writ of supersedeas to preserve the status quo of the parties pending the determination of the appeal on the merits, though the statute has not provided that the bond upon appeal shall operate to suspend or supersede the judgment.

JUDGES AND QUASI JUDGES—DISQUALIFICATION OF. Where one performing the functions of a judge must decide questions of fact, his prejudice against either of the parties sufficient to disqualify him as a juror equally disqualifies him as a judge.

MUNICIPAL OFFICERS—DISQUALIFICATION OF TO ACT ON THE HEARING OF CHARGES.—If charges are filed with a board of directors of a municipality against the superintendent of schools accusing him with misfeasance and malfeasance in office, with conduct unbecoming a superintendent, and with disobeying the rules of the board, one of such directors who is a personal enemy of the accused and the prime mover of the charges against him, and who has announced his intention to join in a finding of guilty and in removing the accused, no matter what the evidence may be, is incompetent by reason of his prejudices to participate in the hearing of such charges.

PROHIBITION—WRIT OF AGAINST A DISQUALIFIED JUDGE OR OFFICER ACTING AS A JUDGE.—A writ of prohibition should issue to prevent a school director from participating in hearing and determining charges against a superintendent of schools, when the director is shown to be a personal enemy of the accused, to have been instrumental in having the charges preferred, and to have announced his intention to vote for his removal, no matter what the evidence should be.

Osborn, Steele & Aust, and Donworth & Howe, for the appellant.

James F. McElroy and John B. Hart, for the respondents.

[9] DUNBAR, J. The appellant, F. J. Barnard, is superintendent of public schools of the city of Seattle. Charges were filed with the respondents, as the board of directors of said school district, charging the said Barnard with misfeasance and malfeasance in office, with conduct unbecoming a superintendent of schools, and with disobeying the rules of conduct established by the board of directors. Citation was issued to the appellant, citing him to appear before the board of directors to answer to the charges. The appellant objected to A. J. Wells, one of the board of directors, sitting as a member of the tribunal to hear and determine the charges, on the ground that said Wells was disqualified by reason of bias, prejudice and personal enmity toward the appellant. On the seventeenth day of December, 1897, on the application and affidavit of the appellant, Barnard, the superior court of King county, Washington, issued its writ of prohibition in the alternative to the respondents, staying proceedings until the further order of the court. On the return of said writ the superior court sustained a demurrer thereto quashing the writ, and entering judgment in favor of the defendants for their costs. The demurrer [10] was sustained upon the ground that no facts were stated sufficient to authorize the issuance of a writ. The appellant forthwith gave notice of appeal, and asked the court to fix the amount of the supersedeas bond. The court fixed the amount of the bond to operate as a supersedeas, but announced to the counsel for respondents in open court that the bond would operate only to stay execution for costs, because the judgment appealed from was not such a judgment as could be superseded. The appellant forthwith filed his bond on appeal in the amount fixed by the court, and conditioned as a supersedeas bond. The board of education, and Mr. Wells, sitting as a member thereof, proceeded with the hearing of the charges against the appellant. The appellant then applied to this court for an order of supersedeas, on which an alternative writ was granted, and the case is here now for final determination.

We are inclined to think that the bond upon appeal conditioned as supersedeas under our statutes did not operate to suspend and supersede the judgment quashing the alternative writ. But we think that this court, in the exercise of its dis-

cretion, by virtue of its inherent powers as an appellate tribunal, can issue an order of supersedeas to preserve the status quo of the parties, pending the determination of the appeal upon its merits. Section 4 of article 4 of the constitution of Washington, after reciting the original jurisdiction of the supreme court, says further: "The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction."

It is conceded that an appeal lies from the judgment of the court in quashing the writ, and, under the provision just read, for the purpose of making that appeal effective, and to insure the complete exercise of this court over that appeal, it becomes necessary and proper to supersede the [11] judgment, otherwise the right to appeal which the statute has given would be of no avail to the appellant, for if the board of directors in the mean time were to proceed to remove him, when the case finally reached this court on appeal it would have to be dismissed for want of merit, because the trial on merit would already have terminated: People v. Commissioners of Excise, 61 How. Pr. 514. We think this is exactly the kind of a case which is contemplated by the constitution, and that the only way that this court could maintain the complete exercise of its appellate jurisdiction would be by issuing the writ prayed for. There would be no meaning to the provision of the constitution, and no necessity for it, if it could only be held to apply to cases where supersedeas was provided for by the law. In Home Fire Ins. Co. v. Dutcher, 48 Neb. 755, it was held that in cases where the statute makes no provision for a supersedeas, as a matter of right, the court may, in its discretion, allow a supersedeas upon conditions which it may affix for the protection of the parties, and that it is within the power of the court, in its discretion, after obtaining jurisdiction of a case by appeal, to allow a supersedeas in cases not provided for by statute, and upon terms which the court may prescribe. To the same effect is Janesville v. Janesville Water Co., 89 Wis. 159. In that case the court said: "Within the limitation that the appeal is taken and prosecuted in good faith, and that the party asking it gives the reasonable security required for that purpose, a stay of proceedings during the pendency of an appeal is quite of course, and really a matter of right, without which an appeal allowed by law would often prove fruitless, and the appellate jurisdiction of the court be found inadequate to the ends of justice and the proper pro-

tection of the rights of parties during the pendency of the appeal."

In Hill v. Finnigan, 54 Cal. 493, the court said: [12] "We have no doubt but this court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right."

And the qualification mentioned by the court in that case is not in point here, for there is nothing to prevent the board proceeding with the trial of the cause without the concurrence of the member objected to. In Levy v. Goldberg, 40 Wis. 308, it was held that the power of the court to stay proceedings in any matter appealed to it did not altogether depend upon statutory enactment, but was inherent in the court. The same announcement was made in Northwestern Mut. Life Ins. Co. v. Park Hotel Co., 37 Wis. 125.

The substance of the affidavit for the writ is to the effect that A. J. Wells was a personal enemy of the relator, that he was a prime mover in having the charges preferred and prosecuted, that he was biased and prejudiced against relator, that he had no personal knowledge of any of the facts alleged in the charges, that he had publicly announced his intention to vote to find relator guilty, and that he proposed to vote to remove him from his office no matter what the evidence might be, and that his mind was made up and his determination fixed.

The case of Fawcett v. Superior Court, 15 Wash. 342, 55 Am. St. Rep. 894, is relied upon by the respondent to maintain his contention that the board of education cannot be restrained from proceeding. That was a quo warranto proceeding to try the right to an office. The judgment of ouster had been pronounced against Fawcett, and it was held by this court that the judgment was self-executing, and that without the aid of process or further action of the court it accomplished the object sought to be attained, so that there was nothing upon which the bond [13] could operate except for costs. But that is altogether different from the case at bar. It was the object of the appellant in this case to prevent himself from being placed in the position in which Fawcett was placed by the judgment of ouster. Were he to stand by, and allow the board to proceed and remove him from his office, then he would be as helpless as Fawcett was in the case cited; but it is for the very purpose of maintaining his rights and preventing his being overtaken by that condition that this stay is sought.

It is stoutly contended by the respondents that this case does

not fall under any of the disqualifications of the judge provided in subdivision 4 of section 163 of the Code of Procedure (Ballinger's Code, sec. 4857), and that, outside of the provisions of the code, a judge is only disqualified by having a financial interest in the result of the suit. We have examined with care all the authorities cited by the respondents to sustain this contention, but are of the opinion that they fail to do so. Most of the cases either fall within the doctrine of necessity, which is announced by some of the courts, where to challenge the judge successfully would prevent the hearing of the cause, as in cases where there was no other tribunal to try the case, or where the judge was sitting merely to declare the law and the case was tried by jury, and in all the cases we think an appeal would lie. It may be said here that no appeal lies from the decision of the board of directors, and the judges act in the capacity of jurors; and, while some courts have decided that the tests of the respective qualifications of judges and jurors are not the same, yet, in a case of this kind, where the judges pass upon the facts, and it is a pure question of fact which is presented for their consideration and for their determination, we see no good reason why the test of qualification should be different; for the judge in this case is in reality a juror passing upon questions [14] of fact. It is true that on page 52 of 12 American and English Encyclopedia of Law, the proposition is announced that, "in the absence of statutory provisions, prejudice not based on property interest in the judge is not assignable as a legal cause of disqualification." But this broad assertion of the text is not borne out by the cases cited to sustain it, many of which are cited by the respondents in this case. For instance, in McCauley v. Weller, 12 Cal. 500, it was held by the supreme court of California, through Terry, C. J., that "the exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper, and reprehensible, is calculated to throw suspicion upon the judgments of the court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the judge is disqualified from sitting."

But even admitting the correctness of that decision—which we are not inclined to do—the court evidently would have come to a different decision in a case of this kind, for they based the decision on the ground that the province of the judge was to decide questions of law alone, and that his decisions upon these

points were not final, but, if erroneous, the party had his remedy by appeal. People v. Mahoney, 18 Cal. 181, is substantially the same holding, the argument being that, if the judge acted illegally on the trial, or denied the prisoner his legal rights, it could be remedied on appeal. In People v. Williams, 24 Cal. 31, the court quotes approvingly section 2945 of Wharton's Criminal Law, where that author says: "The practice among the civilians extends the right of challenges for cause to the judges as well as the jurors; and the great inclination of authority is, that the same causes which disqualify one disqualify the other. Where [15] the judge, like a chancellor, sits to try both facts and law, as in the case with the civilians, there is peculiar reason for the application to him of a jealous test."

But in this case the judges were simply sitting as judges to pass upon questions of law, and the court discriminated that case from such a case as the one in hand.

Chapman v. Stoneman, 63 Cal. 490, does not seem to us to be in point. It was simply held in that case that the governor had authority and jurisdiction to investigate questions of misconduct on the part of the state board of prison directors. There is no intimation in the case anywhere of any charge of bias or prejudice on the part of the governor. Allen v. Reilly, 15 Nev. 452, cited on page 8 of respondents' brief, is evidently a miscitation, as the case is not to be found in that volume. It was probably taken from the citations given by 12 American and English Encyclopedia of Law to sustain the text announced by that court, which we commented on above; but the author was mistaken in the citation. Pearson v. Hopkins, 2 N. J. L. 181 (142), *195, was a challenge to a judge who had acted in the circuit court, and had overruled a motion of the defendant for a nonsuit, and it was held that this did not disqualify him from sitting in the case on appeal, the court rightfully taking the view that, if the expression of an opinion by a judge on the law disqualified him, he would be disqualified from trying a case upon the granting of a motion for a new trial. The same was substantially the holding in Pierce v. Delamater, 1 N. Y. 17, and the same, in substance, was decided in Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573. We do not think the other cases cited in respondent's brief, and commented on therein, are in point. We will, however, especially notice the two which are nearest in point. In People v. Board of Police Commrs., 84 Hun, 64, it was held that it was not error for a commissioner [16] to sit on the trial of charges against a policeman after he

had been challenged on the ground that he had prejudged the case, and did not intend to give the policeman a fair trial, it not being claimed that the commissioner had any interest in the matter, or was disqualified by any statute. This case was based on the doctrine of necessity, and it was asserted by the court that, if the judges who were challenged were thereby rendered disqualified to try the case, the relator could secure himself in office, because it would leave the board without a majority of its members to render a judgment or make a determination. And in People v. Common Council, 85 Hun, 601, the decision is substantially the same as the one noticed above, where the court quoted approvingly the announcement by the court in In re Ryers, 72 N. Y. 1, 28 Am. Rep. 88, "that it must be the law from these cases that, where the judicial power has been confided to one judge, and, if he should fail to act, there would be no means of proceeding in the matter, though interested, he may take such cognizance of the case as is absolutely necessary, so far that the party shall not be without remedy."

But the two last cases, as far as they did go on the subject —and they may be conceded to come nearer sustaining respondents' contention than any other cases cited—were overruled in People v. Board of Trustees, 4 N. Y. App. Div. 399, 618, where it was held that a village trustee who prefers charges against a village officer is disqualified to sit as a member of the board of trustees on hearing of the charges, as otherwise he would act as both accuser and judge; especially disapproving People v. Common Council, 85 Hun, 601, and further holding that the removal of a village officer by the board of trustees is illegal where the charges were preferred by one of the trustees who sat on the hearing, [17] and without whom a quorum of the board would not have been present. And noticing the doctrine of necessity above spoken of, it was held that the exception to the rule that judicial officers shall not act in a matter in which they are interested, in order to prevent a failure of justice, does not apply so as to permit a disqualified member of a board, the powers of which may be exercised by a majority of its members, to take part in a judicial proceeding by the board. This case seems to us to be a parallel case with the one at bar, so far as this question is concerned. The court makes the announcement that one of the rights secured to an accused person by the law of the land is that his accuser shall not be at the same time his judge.

"Cases are to be found," say the court in this case, "where

judicial officers, or officials acting in a judicial capacity, have been permitted to act, notwithstanding the disqualification of interest; but I think, without exception, they have all been cases where, unless such officer was permitted to act, there would have been a failure of justice, for the reason that there was no other person who could act. They have been confined to cases where the judicial tribunal or body to act consisted of but a single person, and there was no other tribunal or officer before whom the proceedings could be taken, and the officer was permitted to act from necessity."

It is conceded by the counsel for the respondents that this case overrules the former cases reported in the New York App. Div., but they insist that the reasoning of the former cases is better, and that the decisions are more in consonance with the adjudicated cases. But we cannot agree with them on this proposition. The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through [18] and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty, and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in People v. Suffolk Common Pleas, 18 Went. 550: "Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."

The reason that financial interest or near relationship to a litigant is held to be sufficient to recuse a judge is that it is to be presumed that self-interest or natural affection will uncon-

sciously prejudice a judge, and deprive the litigant of a fair trial. This presumption in certain cases may or may not be justified by the truth, but so solicitous is the law to maintain inviolate the principle that every litigant shall be secure in his right to a fair trial that he is accorded the benefit of the presumption. But what does a presumption amount to compared with the admitted fact that the judge will not accord the litigant a fair trial—that he will vote to remove him from his office, no matter what the [19] evidence may be? And this, so far as this case is concerned, the demurrer to the affidavit having been sustained, must be considered the fact. To compel a litigant to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it, no matter what the evidence may be, would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression "administration of justice." As sustaining this view, the following cases, cited by appellant, are found to be in point: Barnett v. Ashmore, 5 Wash. 163; Moses v. Julian, 45 N. H. 52; 84 Am. Dec. 114; Stockwell v. Township Board, 22 Mich. 341; Oakley v. Aspinwall, 3 N. Y. 547; Williams v. Robinson, 6 Cush. 334. A review of the cases cited by appellant is made by the respondents for the purpose of showing that the facts decided in them are not similar to the facts in the case at bar, and, while it is true that in some of the cases financial interest was claimed, yet, as a rule, the decisions are not based upon that ground, but upon the broad ground that the citizen is entitled to a judge who is absolutely impartial. The merits of the case are not now before us. The permanent writ will issue.

Scott, C. J., and Anders, Gordon, and Reavis, JJ., concur.

JUDGES—DISQUALIFICATION.—Friendly or hostile relations existing between a judge and one of the parties to the action may be good ground for recusation: Moses v. Julian, 45 N. H. 52; 84 Am. Dec. 114, and monographic note.

PROHIBITION—WHEN ISSUES.—A prohibition is commonly defined to be a writ issuing out of a superior court, directed to the judge and parties of an inferior court, commanding them to cease from the prosecution of a suit, because of want of jurisdiction over the suit or some collateral matter therein, but the writ may be directed to persons whose functions have little or nothing of a judicial nature: State v. Commissioners of Roads, 1 Mill. 55; 12 Am. Dec. 596, and monographic note as to when prohibition lies.

Implied Power of Courts to Issue Writs of Supersedeas.

Definition.—A supersedeas, in the strict sense of the word, means the setting aside or annulling of an act; but the word, in its legal

acceptation, means the preventing, as well as the setting aside or annulling, of an act: Bacon's Abridgement, tit. "Supersedeas." Originally, it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come into his hands: Dulin v. Pacific Wood etc. Co., 98 Cal. 304. In modern times, the term has been employed to designate the effect of an act or proceeding, such as certiorari, writ of error, or appeal, which, of itself, suspends the enforcement of a judgment, but, in general practice a supersedeas is understood to be the name of a writ containing a command to stay proceedings at law, and, in this note, the term is used synonymously with a "stay of proceedings." A supersedeas is a remedy confined entirely to proceedings and judgments at law, and is an inapplicable and unknown means of redress in chancery: Bentley v. Fowler, 8 Ark. 375, 378. At common law, a writ of supersedeas did not lie from any other court to the court of chancery, but such a writ might, at any time, be awarded from the court of chancery to any other court: Bacon's Abridgement, tit., "Supersedeas." In other words, a supersedeas, from the earliest times, issued not from the inferior, but from the superior court: McWilliams v. King, 32 N. J. L. 21, 24. In most of our states, a supersedeas is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by appeal or writ of error for review: but in some jurisdictions, as in the state of Virginia, the supersedeas, in practice, is a substitute for a writ of error in all cases in which it is designed that the judgment of the court below shall be superseded: Williams v. Bruffy, 102 U. S. 248, 249.

Inherent Power.—In the federal courts, a supersedeas is a statutory remedy: Sage v. Central R. R. Co., 93 U. S. 412, 417, and this is probably so in most of the state courts; but the power of courts, with respect to the writ, is not derived solely from the statute. Our state courts possess, over this subject, the whole power as exercised by all the courts of England, wherever there is general grant of authority to the state court, of supervising the adjudications of inferior tribunals, and to correct their proceedings, if they assume to act without authority of law, or oppressively, or in a manner not authorized by law. Hence, if the constitution of a state gives to its supreme court, by express grant, power to issue writs of supersedeas, but omits to define under what circumstances the writ may issue, the rule of the common law will govern in a proceeding of this kind, where the legislature has not prescribed any rule to be observed in regard to such writs; and, when a party would be entitled to this writ at common law, it will be granted by the state court, upon proper application: Ex parte Caldwell, 5 Ark. 390.

Otherwise expressed, a court having authority to supervise the adjudications of inferior tribunals has inherent power to stay proceedings, in a proper case, where there is no law on the subject: Matter of Pye, 21 N. Y. App. Div. 266; Granger v. Craig, 85 N. Y. 619; In re A Company, [1894], 2 Ch. 349; Hill v. Finnigan, 54 Cal. 493; Hudson v. Smith, 9 Wis. 122, 125.

Thus, the supreme court of New York, under the constitution of

that state, has general jurisdiction over all inferior courts of record, including those of probate, and has inherent power to grant a stay of proceedings upon an appeal from an order made in a surrogate's court, which order has been affirmed and remitted to the latter court for its action: Matter of Pye, 21 N. Y. App. Div. 266; and the inherent power of the supreme court of California to make an order operate as a supersedeas, upon condition that a good bond shall be filed in that court, is unquestioned, and such orders have frequently been made: Williams v. Borgwardt, 115 Cal. 617. A court will not ordinarily exercise its inherent power to issue a supersedeas, if no effort has been made to comply with the statute, where one exists: Williams v. Borgwardt, 115 Cal. 617; but the statute does not necessarily abridge the power of the court to stay proceedings on its own judgments for such a time, and on such terms, as it may deem proper. There is a discretion still vested in the court. For example, the supreme court of New York may, in its discretion, stay proceedings pending an appeal without the security prescribed by statute, for the code of that state does not abridge the power of the supreme court over its own judgments: Granger v. Craig, 85 N. Y. 619. The court may, in cases where the statute makes no provision for a supersedeas, as a matter of right, allow a supersedeas, in its discretion, upon conditions which it may affix for the protection of the parties, and it is within the inherent power of the court to do this, after obtaining jurisdiction of a case by appeal: Home Fire Ins. Co. v. Dutcher, 48 Neb. 755, 757.

A supervisory court has the inherent power to secure to an appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right. Hence, if the failure of sureties, upon an undertaking on appeal to stay execution, is merely the result of inadvertence, the supreme court will make an order to operate as a supersedeas, upon proper terms: Hill v. Finnigan, 54 Cal. 493. The supreme court of Wisconsin has inherent power to stay proceedings in any matter appealed to it: Waterman v. Raymond, 5 Wis. 185; Hudson v. Smith, 9 Wis. 122; Levy v. Goldberg, 40 Wis. 308. This power is not dependent upon any statutory enactment of that state, but rests on the general policy of the law allowing the appeal; and this general policy is to allow a party, against whom judicial proceedings have been commenced, to stay proceedings, under the decision of an inferior tribunal against him, on giving just and adequate security. If, therefore, the legislature has, in providing for an appeal, neglected to provide adequate security, and for a stay of proceedings pending the appeal, the appellate court may order the same, and fix the amount of security to be given: Hudson v. Smith, 9 Wis. 122; Levy v. Goldberg, 40 Wis. 308. Compare Hill v. Finnigan, 54 Cal. 493; Mills v. Thursby, 11 How. Pr. 129. And this policy of the law applies to an appeal from an order refusing to vacate a judgment on default, as well as to an appeal from the judgment: Levy v. Goldberg, 40 Wis. 308. If a trial court, in that state, has refused to stay the execution of an order appointing a receiver of a corporation,

pending an appeal, the supreme court has the inherent power, by virtue of its appellate jurisdiction, to grant such a stay and to restore the parties, so far as may be, to their condition in respect to the matter affected by the order at the time it was granted: Janesville v. Janesville Water Co., 89 Wis. 159. In this case, the court said: "Appeals from orders and judgments, in the cases allowed by law, are a matter of right; and, within the limitation that the appeal is taken and prosecuted in good faith, and that the party asking it gives the reasonable security required for that purpose, a stay of proceedings during the pendency of an appeal is quite of course, and really a matter of right, without which an appeal allowed by law would often prove fruitless and the appellate jurisdiction of the court be found inadequate to the ends of justice and the proper protection of the rights of parties during the pendency of the appeal": Janesville v. Janesville Water Co., 89 Wis. 159. But, strictly speaking, a supersedeas can be had, as a matter of right, only where it is affirmatively provided for by statute: Home Fire Ins. Co. v. Dutcher, 48 Neb. 755, 757. A justice of the supreme court of Wisconsin has the power, in vacation, to make a provisional order for the stay of proceedings in the court below, to enable a party to make or renew, if need be, a similar motion in term: Waterman v. Raymond, 5 Wis. 185, 186.

Injunctions—Extending Stay until Hearing.—The power of the court of errors and appeals of the state of New Jersey, or of the court of chancery, of that state, to stay proceedings on an order appealed from, is not denied, and this power extends to orders dissolving injunctions: Chegary v. Scofield, 5 N. J. Eq. 525, 533. In this case, the court said: "It was formerly held that an appeal from an order dissolving an injunction revived the injunction. But, by our present practice, an appeal from an order does not stay proceedings thereon without an order of the court of chancery, or of this court, for that purpose first had, and upon complying with such terms as the court making the order to stay proceedings may impose."

In Doughty v. Somerville etc. R. R. Co., 7 N. J. Eq. 629, 51 Am. Dec. 267, the chancellor, on appeal from an order dissolving an injunction, granted an order staying the proceedings to restrain which the injunction had issued, until the next sitting of the court of errors and appeals, and in the latter court, at its next sitting, a motion was made for an order extending the stay until the hearing on the appeal. It was held that the court of errors and appeals had power to make such an order, though it was denied under the circumstances of the case. The court said: "The chancellor having granted a stay of proceedings until the coming in of the appeal, we are now asked to extend that order to the hearing, and the first question raised is as to the power of the court to grant such an order; it being, as alleged, an exercise of original jurisdiction, and we but an appellate tribunal. I had supposed that the question of power had been considered settled in this court, as well as from its various exercises, as from the discussion and opinions delivered in Chegary v. Scofield, 5 N. J. Eq. 525. The right to grant such an order must exist in the very nature of things. To deny it is to deny the right of appeal in the case; for if we have no

power to protect the subject matter of the appeal, then is the right nugatory. It would be worse than useless for us to hear the merits of the appeal argued, and to decide thereon three or six months after the evil complained of has been suffered to be committed, and has become irremediable, or the injury irreparable. Nor is the granting a temporary order, at this time, any more an exercise of original jurisdiction than the reversing, at the hearing, of the order of the chancellor dissolving the injunction; for that would be, in fact, granting a perpetual injunction. If we have that power, as of course we must have, then we must also have the power to protect the rights of the parties within the jurisdiction of the court until the cause can be heard. And, as a mere question of power or right of jurisdiction, I see no distinction between this case and the ordinary case of a stay of execution or proceedings in the court below. Both are dependent on precisely the same principles; but, in the exercise of the power by this court, there may be much more difficulty and delicacy in the one than in the other. Why is it that we grant, even as a matter of course, a stay of proceedings in the court below? Why, simply to preserve our own jurisdiction of the case, and to protect the rights of the parties till they can be heard, according to the rules and practice of this court. And is not the granting a rule of the kind now asked for, precisely for the same purpose, based on the same principles? The ordinary rule, perhaps, stays an execution and sale of mortgaged premises, which might be set aside and the parties restored to their rights without the order of stay; but cases may arise when, unless such a rule as is now asked for is granted, the property in dispute may be destroyed before the hearing, or the parties placed in such a situation that, although we may then reverse the dissolution and revive the injunction, our whole proceeding may be nugatory and the party without remedy in this or any other court. So that, in fact, the reason for the existence of the power is stronger in a case of this kind than in an ordinary stay." The remarks of Green, C. J., in the same case are also worthy of note. He said, with respect to the making of the order sought: "It is, in effect, the granting of a new injunction. It is said that this is an original exercise of judicial power; and unquestionably it is so. It is thereupon objected that this is a mere appellate tribunal, and cannot exercise such power. The consequence does not follow. It may not exercise original power in acquiring jurisdiction over the cause. But that jurisdiction once regularly obtained this court may exercise original jurisdiction over the parties, especially when the proceeding is in rem, and the object of the order to maintain unchanged, as far as practicable, the status or condition of the subject matter of the controversy during the pendency of the suit. It is on the same principle upon which a court of common law, in an action of ejectment, or dower, will make an order upon the party in possession, restraining the commission of waste. And a court of equity, prior to the hearing or argument, will, upon the same principle, grant a temporary injunction until the case can be heard. It is an inherent power in all superior tribunals, essential

to the attainment of the object of litigation and the ends of justice. I am of opinion, therefore, that this court must, of necessity, have the power to make the order applied for." It may be remarked here that although, under the earlier practice, a mere appeal was a stay to all proceedings, the present practice, in the state of New Jersey, is, either for the chancellor to grant an order to stay proceedings till the hearing, or for the court of errors and appeals, on application, to make the order: Doughty v. Somerville etc. R. R. Co., 7 N. J. Eq. 629; 51 Am. Dec. 267.

The court of appeals of New York has also recognized its power to modify, or even dissolve, an injunction before the hearing, when it becomes necessary to prevent the waste or destruction of the property: Sea Ins. Co. v. Ward, 20 Wend. 588; and, as the general practice permits courts to control their judgments in the interest of justice, a court of original jurisdiction has power, unless some statutory rule prescribes the method of procedure, or there is some statutory prohibition, to suspend the operation of a judgment pending an appeal, and especially where, by so doing, the parties would be left in the position in which they were when the action was brought: Genet v. President etc. Canal Co., 113 N. Y. 472. This power is especially exercised in cases of injunctions pending an appeal. "It is a power inherent in the jurisdiction, and its exercise, although discretionary, may, in many cases, be important in a wise administration of justice, as where there may be doubt as to the correctness of the decision, and great mischief might result to the appellant from the execution of the decree pending the appeal in case the decision should be reversed": Genet v. President etc. Canal Co., 113 N. Y. 472, 474. Thus, pending an appeal in New York to the general term, from a judgment of the special term granting a perpetual injunction, the court, at special term, has the power, upon proper security being given, to order a stay of proceedings on the judgment appealed from, and should do so, if since its rendition the doctrine on which it was founded has been overruled by the appellate court: Sixth Avenue R. R. Co. v. Gilbert Elevated Ry. Co., 3 Abb. N. C. 53, from which it appears that an order of the court, or a judge thereof, is the only way of securing a stay in such a case. The special term of the superior court of the city of New York also has power to suspend, by order, the operation of a judgment rendered by it in an equity case. Or it may relieve a defendant from the duty of immediate obedience to a judgment, pending an appeal, to the court of appeals, if such appeal does not of itself relieve, and a mere order staying proceedings on the part of the plaintiff would not affect that purpose. "There is danger in unduly restricting the power of a court, as in unduly enlarging it"; and the making of an order to suspend the operation of a judgment, pending an appeal, merely suspends the operation of the judgment until the appellate court shall pass upon the law, and such an order the court has power to make: Genet v. President etc. Canal Co., 113 N. Y. 472.

When a Supersedeas should Issue.—It is our main purpose, in this note, to consider the mere question of the abstract power of a court

to issue a supersedeas, and not whether, in a particular case, it ought to be exercised, or under what conditions or limitations. We shall, therefore, denote, very briefly, some instances in which a stay ought to be granted, and some in which it should not be granted; and we do this more for the purpose of throwing light upon the power of the court to grant a stay of proceedings than to particularize the conditions and limitations under which the court will exercise its power.

If great or irreparable injury is liable to result from the prosecution of a cause after an appeal from an interlocutory order is taken, it is undoubtedly the duty of the appellate cout, or of a justice thereof, to grant an order staying proceedings: Waterman v. Raymond, 5 Wis. 185; but it has been held that the appellate court will not, as a general rule, stay the execution of an interlocutory decree, pending an appeal, unless its execution will render it impossible to set the appellant right again in case he is successful on the appeal: Ratzer v. Ratzer, 29 N. J. Eq. 162. Compare Jewett v. Albany City Bank, 1 Clarke Ch. 59; Lindsey v. Lindsey, 14 Ga. 657; St. Louis Nat. Bank v. Bloch, 44 La. Ann. 893. On a pure injunction bill, the court will stay proceedings until the final hearing of an appeal, where such an order is necessary to prevent great and irreparable mischief to the rights of the appellant: Van Walkenburgh v. Rahway Bank, 8 N. J. Eq. 725.

A court, having inherent power to prevent an abuse of its process, will do so, when necessary. For example, if a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the court, without requiring an action to be commenced, will restrain the advertisement of the petition, and stay all proceedings upon it: In re A Company [1894], 2 Ch. 349. So, while nonpayment of costs furnishes no sufficient ground, of itself, for ordering proceedings in the action to be stayed, until payment, the court has jurisdiction to order such stay if the action is vexatious, or has been vexatiously conducted by the plaintiff: Graham v. Sutton [1897], 2 Ch. 367. A defendant in a condemnation proceeding is entitled to a stay of the assessment of damages pending an appeal, where no injury can result to the plaintiff from a stay: Harlem River etc. R. R. Co. v. Arnow, 16 N. Y. App. Div. 380. If it appears, in a pending suit, that the government has an interest in the litigation, the court "ought to direct intimation" to be made to the authorities, and stay the action pending their decision to appear or to bring a separate action: Ogston v. Stewart [1896], A. C. 120.

If the result of a pending suit is dependent upon the decision in another, proceedings in the first suit may, in proper cases, be stayed to await that decision: Succession of Troxler, 46 La. Ann. 738; Foley v. Hartley, 72 Fed. Rep. 570; Isear v. Daynes, 1 N. Y. App. Div. 557; American Grocery Co. v. Flint, 5 N. Y. App. Div. 263. A stay should be granted where no harm can result to either public or private interests; and, if a question is unsettled, and of frequent occurrence, a stay of proceedings pending an appeal should be granted, where it may be speedily heard, however positive the

judge may be in the correctness of his conclusion: People v. Nolan, 10 Abb. N. C. 471. If, at any stage of the proceedings, it appears that a final decree cannot be rendered without materially affecting the rights of one not a party, it is the duty of the court to stay further action until such party is brought within the jurisdiction of the court: Knopf v. Chicago Real Estate Board, 173 Ill. 196; but it is held that a stay of proceedings in one action, until the determination of another, pending in another suit, should not be granted, if the party against whom a stay is sought is neither a party nor a privy to such other action, and cannot, therefore, be bound by any adjudication therein: Dolbeer v. Stout, 139 N. Y. 486. In cases not within the statute, a court of original jurisdiction may, in its discretion, allow a supersedeas on proper terms. In fact, it should allow it where the rights of the appellant will be jeopardized if the order is not superseded, and where no one will be injured beyond the protection of a bond, if the order is superseded: Penn. Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co., 51 Neb. 659.

A stay should also be granted to avoid embarrassment in attaining the ends of justice in attachment suits: Howland v. Chicago etc. Ry. Co., 134 Mo. 474. A court may suspend its judgment dissolving an attachment, to preserve the status quo, pending an appeal from the dissolution. This course saves the appellant from the necessity of applying to the appellate court for such an order, and without it the purpose of the appeal would be defeated by a sale of the property: Winter v. Coulthard, 94 Iowa, 312, 316. So, if a defendant, in a proceeding at law, is garnished, and the object of such suit is to reach the same money for which the action at law was brought it is proper practice to stay the proceedings at law until his liability as garnishee is determined: Knight v. Griffey, 57 Ill. App. 583.

The existence of the power to suspend proceedings pending an appeal is necessary for the beneficial exercise of appellate as well as of original jurisdiction: Thompson v. McKim, 6 Har. & J. 302; but when not essential to appellate jurisdiction, the power of an appellate court to stay, by injunction, the exercise by a city of any of the functions of government over lands brought into it by annexation of territory, may seriously be doubted: Forsythe v. Hammond, 137 Ind. 426. A stay should be granted by an appellate court where the inferior tribunal had no jurisdiction, at the time of pronouncing judgment: Ex parte Caldwell, 5 Ark. 390. It should also be granted if an enforcement of the decree, pending an appeal, will make it impossible to set the appellant right again, if he succeeds on his appeal; but a stay should be denied if it is not necessary for the appellant's protection, and will seriously prejudice his adversary: Jewett v. Dringer, 29 N. J. Eq. 199.

An order appointing a receiver pendente lite cannot be superseded as a matter of right during the pendency of an appeal therefrom: State v. Stull, 49 Neb. 739; and a premature application for a supersedeas will be denied: Dorn v. Crank, 96 Cal. 381, 383. So where a court has followed the decisions of other courts in cases

where writs of supersedeas have been denied, it will also refuse a supersedeas on allowing an appeal: Thomson-Houston Electric Co. v. Ohio Brass Co., 78 Fed. Rep. 142. On an appeal from an order denying a motion to vacate the appointment of a receiver, a stay of proceedings on a writ of assistance pending the appeal will be denied, even where the writ of assistance ought not to have issued. The proper remedy is by action: Gelpeke v. Milwaukee etc. R. R. Co., 11 Wis. 454. If a court is satisfied that a writ of error has been sued out for the mere purpose of delay, it may make an order that the writ of error shall not supersede or stay execution, and the court out of which the writ of error has issued will not ordinarily interfere: Allen v. Hopper, 24 N. J. L. 514.

A writ of supersedeas, or order for the stay of proceedings pending an appeal, "is limited," says the court, in Dulin v. Pacific Wood etc. Co., 98 Cal. 304, 307, "to restraining any action upon the judgment appealed from. It cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment, nor can the writ be employed for any purpose upon persons not parties to the judgment. Its effect is merely to leave the parties to the judgment in the same position as they were prior to its entry, and to prevent the appellant from being prejudiced by its enforcement." A circuit court of appeals has the inherent power to grant a supersedeas on appeal from a final decree, but it will not, pending an appeal from a decree granting a perpetual injunction, and in advance of a decision by the trial judge upon the merits, interfere in this way with the trial judge's exercise of discretion in refusing a supersedeas pending the appeal, especially where a speedy hearing of the appealed case may be had on the merits: American Straw Board Co. v. Indianapolis Water Co., 81 Fed. Rep. 423; 46 U. S. App. 526. If adequate protection can be afforded by giving security, a stay may be refused on security being given: Jewett v. Dringer, 29 N. J. Eq. 199.

A motion is the proper practice to secure a stay of proceedings, and which ought to be made in the court whose immediate decision is the subject of review: Eno v. New York etc. R. R. Co., 15 N. Y. App. Div. 336. In considering an application to stay the execution of an interlocutory decree, pending an appeal, it must be assumed by the court that the decree is right: Ratzer v. Ratzer, 29 N. J. Eq. 162; and we have seen that a superior court cannot supersede the process of an inferior court, unless the writ of supersedeas is auxiliary to the appellate jurisdiction of the former: Bank of Newbern v. Stanly, 2 Dev. 476; Carit v. Williams, 67 Cal. 580; Ex parte Floyd, 40 Ala. 116. The right to a stay of proceedings, even in a capital case, is not a matter of absolute right, and the courts may refuse it, if satisfied, on inspection of the record, that there is no merit in the appeal; but as such appeal involves human life, a stay of execution should be granted until the appeal can be heard and determined, particularly if there is any doubt as to some of the assignments of error: State v. Hayward, 62 Minn. 114.

MORSE *v.* ESTABROOK.

[19 WASHINGTON, 92.]

THE COMMUNITY PROPERTY OF A HUSBAND AND WIFE is subject to execution against the husband for his separate debt to which the wife was not a party, though the effect of the satisfaction of such execution out of such property will be to leave the community without assets sufficient to pay its debts.

Dorr & Hadley and Black & Leaming, for the appellants.

Nicholson & Hurlburt, for the respondent.

[92] SCOTT, C. J. The plaintiffs brought this action to restrain the sheriff from selling community personal property under an execution issued upon a judgment against the husband for a suretyship debt to which the wife was not a party. The Seattle Hardware Company intervened also to restrain the sale, alleging that they were creditors of the community and that their claims arose upon a sale to the plaintiffs of some of the property levied upon, et cetera. Judgment was rendered for the defendant, and plaintiffs and intervenor have appealed. In Powell v. Pugh, 13 Wash. 577, it was held that community personal property could be sold on execution to satisfy a judgment against the husband for a separate debt, citing a prior decision of the territorial supreme court. It was urged in that case that the sale ought not to be permitted, on the ground that it appeared there was not enough of the community personalty to satisfy the community debts, but it was said that [93] as none of the community creditors were questioning the transaction the court would not express an opinion as to what rights, if any, they could maintain in the premises. That question is now presented by community creditors. The plaintiffs were engaged in the hardware business and had incurred debts to various persons, including intervenors, for the purchase price of merchandise, but in the absence of any specific lien upon such property for such debts they are not entitled to priority over a creditor of the husband who has obtained a prior levy. This has been the settled practice under the territory and state, and, if it is a hardship, it is a matter for legislative remedy. But it may be well to observe that for a long time, during which several sessions of the legislature have been held, this field has been substantially left alone, and as a result the community property law is fairly well settled and understood. It ought not to be disturbed by bringing about such complications as would arise in sustain-

ing the respective claims of the appellants. As it is, business relations are rendered clear and a man's financial responsibility much more easily ascertainable than it would be under the other condition of affairs. Commercial and purely private interests are to that extent simplified and promoted. There are no classes of unsecured debts of the husband, or the husband and wife, with reference to the personal property, and community real estate can only be reached for community debts. The creditors, whatever the character of their claims, are not interested in the community, and, as far as the husband and wife are concerned, they are protected in the sale of personalty to the extent of the exemptions allowed. There is no ground for disturbing the judgment.

Affirmed.

Reavis, Anders, and Dunbar, JJ., concur.

Gordon, J., dissents.

HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY FOR DEBTS OF HUSBAND.—The community real property is not liable for the separate or individual debts of the husband, whether contracted in this state or elsewhere: La Selle v. Wooley, 14 Wash. 70; 53 Am. St. Rep. 855.

STATE v. SUPERIOR COURT.

[19 WASHINGTON, 128.]

PROHIBITION MAY ISSUE TO PREVENT A COURT FROM VACATING ITS JUDGMENT when it has lost jurisdiction to do so.

JURISDICTION—PRESUMPTION OF.—If a judgment recites that each of the defendants was duly served with a copy of the summons and complaint, and that each failed to appear within the time prescribed, the fact that a document on file in the form of an affidavit of the service of process does not appear to have been sworn to does not overcome the recital of such service contained in the judgment, nor show that it is void.

JUDGMENT—VACATING ON MOTION.—A COURT IS NOT AUTHORIZED, years after the entry of a judgment, to vacate it on motion, where it contains a recital of the service of process, and a writ of prohibition may issue to prevent such vacating. If the defendant has any remedy, it is by a bill in equity, or, perhaps, by a petition.

A. R. Titlow, for the relator.

Stiles & Harvey, for the respondent.

[130] SCOTT, C. J. This is an application for a writ to prohibit [131] the respondent from vacating a judgment rendered in January, 1894, in favor of the Tacoma National Bank, as plaintiff, against Otis Sprague and Mave H. Sprague, husband and wife, defendants, the relator being now the owner of the judgment. The judgment contained a recital that each of the defendants "was duly served with a copy of the summons and complaint," and that each of them had failed to appear within the time prescribed. On the twenty-fifth day of February last the defendants appeared specially and moved to vacate the judgment, serving notice of the motion on the relator and the attorney of record of the plaintiff. The motion to vacate was on the ground that there was no proof of the service of the process. There was no allegation nor showing that the process had not in fact been served. There was a document on file in the form of an affidavit showing personal service of the process upon each of the defendants. The same was not sworn to, and the contention of the respondent is that it must be presumed that this was the only proof of service made, and, it not being sworn to, that the judgment was void. We think under the holdings of this court in Rogers v. Miller, 13 Wash. 82, 52 Am. St. Rep. 20, Christofferson v. Pfennig, 16 Wash. 491, and Kizer v. Caufield, 17 Wash. 417, the presumption must be that there was a valid service. This document might in fact have been sworn to in open court before the judge at the time the judgment was taken. Although it was irregular not to have proof of service appear of record, this would not affect the jurisdiction of the court to render judgment. Furthermore, we do not think the court would have any authority years after the rendition of this judgment to vacate it upon a mere motion like the present one. The plaintiff, or its successor in interest, was not before the court for any such purpose and could only be brought in after this lapse of time by the service of process. [132] A bill in equity, or perhaps a petition, would lie to set aside the judgment, but in such case the plaintiff or the party in interest would have to be legally brought in by service of process, and just cause for setting aside the judgment would have to be shown; for instance, that the process in fact had not been served, and this alone might not be sufficient, for a party is bound to proceed with reasonable diligence. It is also alleged in this case that the defendants have recognized the judgment by making several payments upon it. We think a good cause is shown for

the issuance of the writ: State v. Superior Court, 15 Wash. 500; State v. Langhorne, 12 Wash. 588.

Writ granted.

Gordon and Reavis, JJ., concur.

PROHIBITION—WHEN ISSUES.—The unlawful assumption of jurisdiction either of the entire cause or subject matter, or of something collateral or incidental thereto, is the criterion to determine whether prohibition is the proper remedy: See monographic note to State v. Commissioners of Roads, 12 Am. Dec. 607; State v. Superior Court, 15 Wash. 668; 55 Am. St. Rep. 907, and note.

JURISDICTION—PRESUMPTION OF.—A judgment conclusively establishes the existence of jurisdictional facts recited by it, so far as collateral proceedings are concerned, and no evidence dehors the the record can be received to impeach it: Ex parte Ah Men, 77 Cal. 198; 11 Am. St. Rep. 263. When power to ascertain jurisdictional facts is conferred on the court, and it adjudges jurisdiction in itself, that is not overcome on collateral attack, because other parts of the record may not uphold such finding: Goodwin v. Sims, 86 Ala. 102; 11 Am. St. Rep. 21, and note. See Callen v. Ellison, 13 Ohio St. 446; 82 Am. Dec. 448; Sears v. Sears, 95 Ky. 173; 44 Am. St. Rep. 213, and note.

JUDGMENT—VACATING AFTER TERM.—The power of setting aside judgments on motion is a common-law power of courts of record but it was rarely exercised after the term in which the judgment was rendered: Kemp v. Cook, 18 Md. 130; 79 Am. Dec. 681. After the close of the term at which a judgment was rendered it is too late to move to set it aside, except for such grounds as by the practice of the courts of the state may be interposed regardless of the lapse of time. After such time the court has, for most purposes, exhausted its jurisdiction: See monographic note to Furman v. Furman, 60 Am. St. Rep. 639.

SNYDER *v.* PARKER.

[19 WASHINGTON, 276.]

A CONVEYANCE ABSOLUTE IN FORM, but intended to secure the payment of a debt, is a mortgage, does not convey the legal title, and an action of ejectment cannot be maintained thereon.

Coleman & Hart, for the appellant.

George E. Banks, for the respondent.

276 REAVIS, J. Action to recover possession of land. Appellant claimed title under a warranty deed executed October 1, 1895. The deed was absolute in form. The complaint alleged that on the 1st of October, 1895, appellant leased the premises to respondent for a term of one year, and that the term had expired and respondent refused to surrender possession. Respondent answered, denying appellant's title and setting up

that the deed, though absolute in form, was in fact a mortgage to secure the payment of a debt. The action was tried with a jury and a verdict was returned in favor of respondent. A motion was made for a new trial and denied, and judgment entered upon the verdict, from which appeal is taken. The principal error assigned is denying appellant's motion for judgment on the evidence. We have examined the evidence brought up in 277 the record and cannot conclude there is not sufficient to justify the verdict of the jury. Respondent was in possession of the premises at the time of the execution of the instrument. There seems to have been no stipulation relative to possession between the parties at the time of its execution. It was not to be recorded for six months after its execution, for the reason that respondent might have an opportunity to negotiate a loan or execute a mortgage upon the premises to pay the debt for which the deed was executed. Respondent testified that the deed was executed to secure a debt; appellant, on the contrary, that it was executed in payment of the debt. There was a written memorandum, unsigned, but upon the envelope enclosing the deed, which was delivered to the appellant at the time of its execution, which recited that the deed was to be delivered to respondent by appellant upon the payment by respondent to the First National Bank of Snohomish of the sum of one thousand and eighteen dollars and eighty cents, with interest thereon at one per cent per month from March 27, 1894, and the further sum of one hundred dollars attorneys' fees in a suit of respondent against one Stevens within one year from the same date, and also that the deed was not to be recorded within six months of the date, unless respondent died. The bank mentioned also held a mortgage executed by Stevens to respondent as collateral security for the same debt. Under the terms of the memorandum this mortgage was to be reassigned by the bank to respondent upon payment of the sum mentioned. The debt was evidenced by a promissory note which was not canceled. We are not satisfied that there is any error in the instructions of the superior court to the jury, and there was substantial testimony upon which the jury found that the instrument, although absolute in form, was in fact a mortgage.

The only remaining question is the legal effect of such an instrument. Appellant has cited some early California 278 cases, particularly that of Hughes v. Davis, 40 Cal. 117, to maintain the proposition that a mortgage in the form of an absolute deed conveys the legal title to the grantee. But the later cases from

California do not sustain such doctrine. In Healy v. O'Brien, 66 Cal. 517, the court says, when the deed sued on in ejectment is shown to be a mortgage, if answer seeks to redeem, judgment should provide for foreclosure and sale. In Smith v. Smith, 80 Cal. 323, the court said: "It is the settled rule in California that if a deed absolute in form was made merely to secure the payment of money to the grantee, it is a mortgage, and does not pass the title. Such a deed gives a mere lien upon the property just as if the parties had put their agreement in the form of a mortgage, and consequently does not give the right of possession to the grantee."

The same views are expressed in Murdock v. Clarke, 90 Cal. 427. 1 Jones on Mortgages, section 20, cites authorities and comes to the conclusion that: "Even an absolute deed without any defeasance, if in fact made to secure a debt, so that in equity it is a mortgage, passes no title to the grantee": See, also, 1 Jones on Mortgages, secs. 669 and 717. The statute of this state (2 Hill's Code, sec. 539—Ballinger's Code, sec. 5516), declares: "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law."

It is an elementary principle that in ejectment the plaintiff must recover on the strength of his own title. The instrument in suit having been found a mortgage, appellant should not recover possession under its terms.

The judgment of the superior court is affirmed.

Scott, C. J., and Anders, Dunbar, and Gordon, JJ., concur.

MORTGAGES—A DEED ABSOLUTE IN FORM is in fact, a mortgage, when given to secure the payment of money, although the parties have agreed that, upon default in payment, the deed should become absolute: State Bank v. Matthews, 45 Neb. 659; 50 Am. St. Rep. 565, and note. But a deed should not be declared a mortgage unless the evidence leaves in the mind of the trial judge a clear and satisfactory conviction that the instrument, which in form is a conveyance, was by all the parties thereto intended as a mortgage: Mahoney v. Bostwick, 96 Cal. 53; 31 Am. St. Rep. 175, and note.

EJECTMENT—TITLE NECESSARY TO SUPPORT—INTEREST OF MORTGAGEE.—A mortgagee may maintain ejectment as well before as after default, unless there is an express provision that the mortgagor should retain possession until default in payment, since by the execution of the mortgage the entire legal estate passes to the mortgagee. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most of the states of the Union in which the common-law system prevails: Barrett v. Hinckley, 124 Ill. 32; 7 Am. St. Rep. 331. Compare Burr v. Spencer, 26 Conn. 159; 68 Am. Dec. 379; Savage v. Dooley, 28 Conn. 411; 73 Am. Dec. 680, and note.

STATE v. PRATHER.

[19 WASHINGTON, 336.]

CONSTITUTIONAL LAW—A STATUTE AUTHORIZING THE PLAINTIFF IN AN ACTION OF FORCIBLE ENTRY or detainer or of unlawful detainer to obtain a writ of restitution restoring him to the possession of the property described in his complaint upon giving a bond in such sum as the judge may order, with two or more sureties to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay and pay all costs that may be adjudged to the defendant and all damages he may sustain by reason of the writ of restitution, should it be found to have been wrongfully sued out, is not unconstitutional. It does not deprive any person of life, liberty, or property without due process of law. Especially is this true if the statute provides that the defendant may avoid the execution of the writ of restitution by giving on his part a bond as therein provided for.

Cyrus Happy, for the relator.

E. Fitzgerald, for the respondents.

337 GORDON, J. The relator was plaintiff in an action of unlawful detainer pending in the superior court of Spokane county, and in that action applied to the court for a writ of restitution pursuant to the provisions of section 5534 of Ballinger's Code. Upon hearing, the application was denied upon the ground that that section, which is section 10 of the act of 1891 (Sess. Laws, p. 183), was unconstitutional. Thereupon the relator instituted this proceeding for a peremptory writ of mandate to compel the respondent as judge to grant the motion of plaintiff for an order requiring the clerk of the superior court to issue a writ of restitution and to fix the amount of bond to be given by the plaintiff thereon. The sole question for our determination is whether section 5534 of Ballinger's Code is in violation of the constitutional provision that: "No person shall be deprived of life, liberty, or property without due process of law" (Wash. Const., art. 1, sec. 3), which is substantially the provision of the federal constitution, article 14, section 1. The section under consideration is as follows: "The plaintiff, at the time of commencing an action of forcible entry or forcible detainer or unlawful detainer, or at any time afterward, may apply to the judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution 338 to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall

issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such a sum as the court or judge may order, with two or more sureties, to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out."

It is the contention of the respondent that the procedure provided for by this section effects an invasion of personal and property rights, and operates to arbitrarily deprive the citizen of his property without giving him an opportunity to be heard. We think the statute does not deprive defendant of his property, but merely the right to the possession of it—if he fails or neglects to give a bond—pending the suit, and unless the plaintiff prevails in the action a return of the property to the defendant must follow. That the statute does not in express terms require that the bond should so provide in nowise alters the case. It results from a judgment in defendant's favor as fully as if it was specified in the bond. The procedure under this statute is analogous to that in replevin, with this difference in the practical operation of it, that whereas in replevin the property, because of its perishable nature, cannot always be returned, under the statute we are considering the very nature of the property renders it almost certain that it can be, and in both cases the defendant is protected by the bond. We can conceive of no objection to this statute that could not be urged with equal force to the statutory action of claim and delivery, the constitutionality of which, so far as we are aware, has never been 339 questioned. In either case, if defendant fails to give the forthcoming bond the possession (not title) passes to the plaintiff pending the suit, and, if plaintiff fails upon the trial, the judgment should provide for its return. The most that can be said is, that defendant is deprived of the temporary use of his property, upon being secured for any loss or damage that may thereby accrue, and even this he can avoid by giving the bond provided by the statute. We do not think that this procedure entails such hardship upon a defendant as requires us to hold the act unconstitutional. As was said by the court of appeals of New York in Happy v. Mosher, 48 N. Y. 313: "Laws must furnish general rules, and are to be judged by their general effects and tendencies, and not by the particular mischief which, under possible circumstances, they may occasion."

In attachment, the defendant is deprived of the use of his property and the possession of it pending the litigation. In replevin, the defendant is not only deprived of its possession, but his adversary is actually put in possession of it pending the litigation. It cannot be successfully maintained that the constitutional provision under consideration distinguishes between real and personal property, and regards the one more sacredly than the other, and there is no more constitutional warrant for depriving one of his personal property than of his real property without due process of law. In proceedings under the arrest and bail act—which obtains in nearly all of the states—the defendant may be arrested and deprived of his liberty pending litigation and in advance of the judgment of any court, unless he gives security to perform the judgment. In the case of stock or cattle distrained damage feasant, it is commonly provided by statute that their possession may be withheld from the owner pending legal proceedings. Numerous [340] other instances might be mentioned in which the owner is temporarily deprived of the possession of his property pending litigation concerning it, but we think it would be going too far to conclude that he is thereby deprived of his property within the meaning of the constitutional provision. Section 5539 of Ballinger's Code (2 Hill's Code, sec. 561) provides for a jury in cases arising under this act, as in other law actions, and our conclusion is, that the section in question does not conflict with the constitution. No adjudications under similar statutes have been called to our attention, but upon principle the conclusion we have reached is sustained in Happy v. Mosher, 48 N. Y. 313; Mehlin v. Ice, 56 Fed. Rep. 12; Randall v. Kehlor, 60 Me. 37; 11 Am. Rep. 169; Montana Co. v. St. Louis Min. etc. Co., 152 U. S. 160.

The writ will issue as prayed.

Scott, C. J., and Dunbar and Anders, JJ., concur.

FORCIBLE ENTRY AND DETAINER—WRIT OF RESTITUTION.—The law compels a defendant found guilty of forcible entry and detainer to restore the possession: See monographic note to Mosseller v. Deaver, 19 Am. St. Rep. 545; also, monographic note to Quan Wo Chung Co. v. Laumeister, 17 Am. St. Rep. 264, 265. Plaintiff may recover according to the description of the premises in his warrant, or in the lease under which the defendant received possession from him, and must, at his peril, point out the premises to the sheriff, being compelled to make restitution if he takes more than he has recovered: Emerick v. Tavener, 9 Gratt. 220; 58 Am. Dec. 217.

COLBY v. BACKUS.

[19 WASHINGTON, 347.]

CONSTITUTIONAL LAW.—A STATUTE AUTHORIZING A JUSTICE OF THE PEACE TO IMPOSE THE COSTS OF A CRIMINAL PROSECUTION upon the complaining witness and to direct his imprisonment until they are paid, if such justice finds that the complaint was frivolous and without probable cause, is not unconstitutional, either as depriving a person of his liberty or property without due process of law, or as allowing an imprisonment for debt.

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT.—A constitutional provision forbidding imprisonment for debt relates only to liabilities arising upon contract, and does not forbid the enactment of a statute authorizing the imposition on a prosecuting witness of the costs of a criminal prosecution and his imprisonment until such costs have been paid, when his complaint has been found to be frivolous and without probable cause.

Danson & Huneke, for the appellant.

John A. Pierce, for the respondent.

[347] GORDON, J. Appellant was the complaining witness in a prosecution instituted before the respondent, a justice [348] of the peace of the county of Spokane, in which certain parties were charged with trespass. The trial resulted in the acquittal of the defendants therein, and the court, having found that the complaint was frivolous and without probable cause, ordered and adjudged that the complaining witness (appellant here) should pay the costs. Thereafter appellant obtained a writ of review from the superior court and on a hearing had thereon the judgment and order of the justice was affirmed. From that decision this appeal was taken.

Appellant contends that section 1588 of 2 Hill's Code (Ballinger's Code, section 6700), and section 3050 of 1 Hill's Code (Ballinger's Code, section 1627) are unconstitutional: 1. Because they operate to deprive a person of his liberty and property without due process of law; and 2. Because they allow imprisonment for debt. As to the first contention, the decisions upon similar statutes are conflicting, some courts upholding and others denying their validity. In the following cases the statute was considered constitutional: In re Ebenhack, 17 Kan. 618; State v. Donnell, 11 Iowa, 452; State v. Darr, 63 N. C. 516; Lowe v. Kansas, 163 U. S. 81; State v. Smith, 65 Wis. 93. To the contrary, see State v. Ensign, 11 Neb. 529.

The provision of our state constitution is identical with that of the federal constitution in relation to due process of law, and

we think that the conclusion reached by the supreme court of the United States in Lowe v. Kansas, 163 U. S. 81, is authoritative and should be followed by us. The statute which is assailed in the present case is almost identical with that of Kansas, which was passed upon by the federal court, and we shall not attempt to enlarge upon the decision in that case.

349 As to the second objection, viz., that it has the effect of imprisoning the complaining witness for debt, it was said by the supreme court of Kansas in In re Ebenhack, 17 Kan. 618: "These costs are cast upon him as a penalty—they do not constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery, is a debt."

The imprisonment which is forbidden by the constitution, article 1, section 17, relates to liabilities arising on contract: In re Wheeler, 34 Kan. 96, and the numerous authorities there cited. See, also, In re Boyd, 34 Kan. 570.

Affirmed.

Scott, C. J., and Anders and Dunbar, JJ., concur.

CONSTITUTIONS—IMPRISONMENT FOR DEBT—INTERPRETATION OF PROVISION AGAINST.—The word "debt" as used in constitutional or statutory provisions against imprisonment for debt includes all contractual obligations, but not those of a penal or quasi penal character. In other words, they afford no protection to a defendant who has committed a crime, a tort, or a contempt of court. Following this interpretation it has been held that a statute is valid which provides that when, upon a trial before a justice of the peace for a misdemeanor, it shall be found that the prosecution was instituted maliciously, the prosecuting witness shall be adjudged to pay the costs, and, unless a bond is given therefor, shall be committed to the county jail until they are paid: See monographic note to State v. Brewer, 37 Am. St. Rep. 758, 761.

SPOKANE COUNTY v. PRESCOTT.

[19 WASHINGTON, 418.]

STATUTE OF LIMITATIONS.—AN ACTION AGAINST THE SURETIES ON THE BOND OF A COUNTY TREASURER for his default in not paying over moneys received by him is not within that provision of the statute of limitations providing for actions upon contracts in writing or arising out of written agreements, but is within the provision relating to contracts or liabilities not in writing and not arising out of a written instrument. The duties of the treasurer were fixed by law and not by his bond, and the liability sought to be enforced resulted from a breach of the duty imposed by statute and not by the bond. The undertaking

of the sureties is collateral that their principal will perform his duties, and no action can be sustained against them when none can be sustained against him.

STATUTE OF LIMITATIONS—ACTIONS AGAINST SURETIES.—No action can be maintained against sureties, if, at its commencement, the liability of their principal to the action had ceased to exist because of the statute of limitations.

STATUTE OF LIMITATIONS.—Though a plaintiff is required to ask leave of the court before instituting an action his failure to apply for and obtain such leave does not enlarge the time allowed by the statute within which to commence such action.

Graves, Wolf & Graves, and Danson & Huneke, for the appellants.

John A. Pierce, prosecuting attorney, Harris Baldwin, and F. M. Elsworth, for the respondent.

[418] REAVIS, J. Appellant Prescott was treasurer of Spokane county from January 9, 1893, until January 14, 1895. Prior to entering upon his official duties, he executed an official bond, which was duly approved by the board of county commissioners. On January 14, 1895, it was his [419] duty, as county treasurer, to pay to his successor in office the sum of $72,837.78. He paid to his successor only $19,631.65. There was due from him to the county at that date the sum of $53,206.13. The respondent filed its complaint on the twenty-seventh day of January, 1898, in the superior court, in substance stating the above facts, and on the same day obtained leave from the superior court to bring the suit. Appellants Prescott and his sureties on his official bond demurred to the complaint, stating as ground for the demurrer that the action was not commenced within the time limited by law. The demurrer was overruled, and appellants then answered, alleging that the cause of action accrued on January 14, 1895, and that the action was not commenced until January 27, 1898; that respondent did not apply to the court for leave to bring such action until January 27, 1898; and that it was within the statute of limitations. Respondent interposed a demurrer to the answer, which was sustained, and judgment was entered as prayed in the complaint. The appeal is from this judgment. The appellant Prescott appeared separately, and the sureties appeared together.

Counsel for respondent maintain that the limitation applicable to the action is found in subdivision 2 of section 4798 of Ballinger's Code (2 Hill's Code, sec. 113) as follows: "Within six years: An action upon a contract in writing, or liability express or implied arising out of a written agreement."

Appellants contend that the limitation applicable to the action is found in section 4800 of Ballinger's Code (2 Hill's Code, sec. 115), as follows: "Within three years: An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

[420] The solution of this controversy requires an answer to two questions: 1. Is the principal (the treasurer) sued upon a contract, and, if so, where is the contract found, and what is the evidence of it? 2. Upon what liability is the action maintained, and does it arise out of the official bond of the treasurer? Is it sufficient that the contractual relation between the parties may have had its origin in a written agreement, though the liability sought to be enforced arises from extraneous matters, or must the liability arise directly upon the written agreement?

In Chipman v. Morrill, 20 Cal. 137, Mr. Justice Field, discussing this question, says: "The statute provides that 'an action founded upon any contract, obligation, or liability founded upon an instrument of writing,' except in certain designated cases, shall be commenced within four years, and an action upon a contract, obligation, or liability not thus founded, with certain exceptions, shall be commenced within two years. The statute by the language in question refers to contracts, obligations, or liabilities resting in, or growing out of, written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word 'founded' were omitted, and the statute read 'upon any contract, obligation, or liability upon an instrument of writing.' "

The statute of this state prescribes the duties of the county treasurer. The essence of this action is for the breach of those statutory duties imposed upon the treasurer. His duties under the statute were not contractual. Here, at any rate, is an express obligation imposed, and an express liability for the breach of the obligation. The bond set out in the complaint is the statutory bond which the treasurer is required to execute, together with his sureties. The condition recited in the bond is as follows: [421] "The condition of the above obligation is such that, whereas the above-bounden principal was elected to the office of treasurer of Spokane county: Now, therefore, the condition of this obligation is such that if the said David S. Prescott shall well, truly, and faithfully perform

all official duties now required of him, and shall well, truly, and faithfully execute and perform all the duties of such office of treasurer of Spokane county required by any law to be enacted subsequently to the execution of this bond, then this obligation is to be void and of no effect; otherwise, to remain in full force and virtue."

Manifestly, in conformity to well-recognized legal principles, no action can be maintained against the sureties unless the liability of the principal exists at the time of the commencement of the action. One of the duties of the treasurer required by the statute was the payment of the money in his possession belonging to the county to his successor in office. The liability arose when he neglected or refused to make such payment. Certainly, the cause of action accrued at that date. The undertaking of the sureties was collateral security for the performance of the duties of their principal. The bond itself is security that an officer will discharge his duties. His failure to discharge them is a breach of a statutory duty. The bond does not impose any obligation upon him different from that created by the statute. If he had executed no bond, but had assumed the functions of the office, and collected moneys, the duty would still be imposed upon him to pay them over to his successor. The bond is collateral security, as set forth in Walton v. United States, 9 Wheat. 656. State v. Conway, 18 Ohio, 235, was an action to have execution upon a judgment rendered against a former sheriff and the sureties upon his official bond, where the plea of the statute of limitations was interposed. The court observed: "The actual cause of action is not the execution of the bond (that is more in the nature of a collateral security); [422] but the cause of action is the misfeasance—the false return. Without proof of the false return, there could be no recovery. The action is, in effect, although not so in form, an action against an officer for misfeasance in office. So far as actions of this character are concerned, the limitation acts upon the cause, not the form, of action. And the effect of the statute cannot be evaded by any change in the form of action."

The principle is reaffirmed and restated in State v. Blake, 2 Ohio St. 147. That was an action upon the official bond of the county auditor, and the cause of action was losses to the county in a large amount by reason of a dereliction of duty on the part of the officer. The supreme court of Kansas, in Ryus v. Gruble, 31 Kan. 767, in an action upon a sheriff's bond to recover damages for the levy of a void execution, said: "As before stated,

the wrongs committed by the defendant are the real and substantial foundation for the plaintiff's cause of action, and the sheriff's bond is virtually only a collateral security for the enforcement of such cause of action. The bond does not give the cause of action; the wrongs or delicts do; and the bond simply furnishes security to indemnify the persons who suffer by reason of such wrongs or delicts. Whenever a cause of action is barred by any statute of limitations, the right to maintain an action therefor upon a bond which simply operates as a security for the same thing must necessarily cease to exist. When the principal debt or cause of action fails, the security must also fail." These conclusions are also affirmed in the same court in Provident Loan etc. Co. v. Walcott, 5 Kan. App. 473, and the principle stated in Davis v. Clark, 58 Kan. 454; Board of Commrs. v. Van Slyck, 52 Kan. 622; Mount v. Lakeman, 21 Ohio St. 643; State v. Kelly, 32 Ohio St. 430; Dawes v. Shed, 15 Mass. 6; 8 Am. Dec. 80; Allen v. State, 6 Kan. App. 915; Ware v. State, 74 Ind. 181; Whitney v. Gammon, 103 Iowa; 363.

[423]

If the bond be merely collateral security for the performance of the principal contract, and is not itself the original contract, then the question here in controversy is illustrated by reference to the rules controlling principal and suretyship. In states where a mortgage conveys the fee to the mortgagee, an action upon the mortgage is not barred, though the debt may be; but whereas in this state the mortgage creates a lien only, and is an incident to, and collateral security for, the debt, when the principal (the debt) is barred, no action can be maintained upon the mortgage itself (the collateral security for the debt): 2 Jones on Mortgages, 5th ed., sec. 1207; Van Eaton v. Napier, 63 Miss. 222.

But counsel for respondent propound the question: "Could this action exist if the bond did not also exist?" Certainly not against the sureties; but, as we have seen, their undertaking is collateral security for the obligation imposed upon their principal. The bond here, as has been observed, is the statutory one. There are no voluntary or special covenants contained in it. It is an agreement that the principal will perform his statutory duties; nothing more. The case of Kenton County v. Lowe, 91 Ky. 367, in the court of appeals of the state of Kentucky, was an action brought against a sheriff as principal and his sureties to recover money collected by the sheriff as tax collector, and

by him withheld. The Kentucky statute required the sheriff to execute with sureties an official bond to faithfully discharge the duties of his office, and to pay over to such persons and at such times as they might be respectively entitled to the same all moneys that might come into his hands as sheriff. He was further required to give a special bond before proceeding to collect certain taxes. He failed to execute the special bond, but, [424] nevertheless, collected taxes, and failed to account. The statute further made the sureties on his general official bond liable for moneys for which he failed to account. There seems to have been a special covenant here to pay the taxes; that is, the sheriff did not give the special statutory bond before collecting the taxes, but himself and sureties were liable upon his general bond as a voluntary bond at common law by virtue of the special covenant to pay over all moneys that might come to the principal's hands in his official capacity. However, the case does not fully discuss or state the reasoning by which the court reached its conclusion. Counsel for respondent also cite State v. Murphy, 23 Nev. 390. The action there was upon a bail bond, but the Nevada court distinguishes the case from those of Ryus v. Gruble, 31 Kan. 767, and other cases of the same character, and approves them. The distinction can readily be perceived between an official bond with surety for the discharge of statutory duties and a voluntary bond executed in consideration of an appeal or in consideration of bail. In the former case, the obligation arises upon the duties imposed by the statute; in the latter, there is no obligation other than that created by the bond itself.

Another contention is made by respondent that it was under disability until authority was procured from the superior court to commence this action. But we do not think the statute of limitations was enlarged by the failure of respondent to obtain leave of court, under section 5686 of Ballinger's Code (2 Hill's Code, sec. 696), which requires leave from the court where the action is commenced. There are some authorities cited by respondent which sustain this contention, but some of the cases, notably those in 16 and 24 Minnesota (Wood v. Myrick, 16 Minn. 494; Lanier v. Irvine, 24 Minn. 116), seem to have been overruled by that court [425] in Litchfield v. McDonald, 35 Minn. 167; Baker v. Johnson County, 33 Iowa, 151; Palmer v. Palmer, 36 Mich. 489; 24 Am. Rep. 605. The weight of authority and reason seems to be that when the respondent had the option at any time to obtain leave of court to bring its action, and did

not ask for such leave, it cannot enlarge the statute of limitations by its own delinquency.

The contention of appellants that section 5686 of Ballinger's Code is repealed by subsequent legislation, is not decided here. Upon the record here, the judgment of the superior court is reversed, and the cause remanded for further proceedings in conformity to this opinion.

Scott, C. J., and Anders, Gordon, and Dunbar, JJ., concur.

SURETYSHIP—ACTIONS AGAINST SURETIES—STATUTE OF LIMITATIONS.—If no cause of action exists against a principal on a bond, there can be none against the surety: Eising v. Andrews, 66 Conn. 58; 50 Am. St. Rep. 75. The liability of the latter is dependent upon that of the former: Henline v. Reese, 54 Ohio St. 599; 56 Am. St. Rep. 736. There is no doubt that when a principal debtor is protected by the statute of limitations so that no enforceable liability exists against him, none exists against his surety or guarantor: See monographic note to Leeds Lumber Co. v. Haworth, 60 Am. St. Rep. 207.

LIMITATIONS OF ACTIONS—WHEN STATUTE BEGINS TO RUN.—A party cannot prevent the running of the statute by omitting to do some act which he might have done or which he is required by law to do: Reizenstein v. Marquardt, 75 Iowa, 294; 9 Am. St. Rep. 477, and note. Though a demand is necessary to perfect a cause of action a party interested cannot prevent or postpone the running of the statute by his failure to make a demand: Barnes v. Glide, 117 Cal. 1; 59 Am. St. Rep. 153, and note; Winchester etc. Turnpike Co. v. Wickliffe, 100 Ky. 531; 66 Am. St. Rep. 356.

STATE *v.* SPOKANE STREET RAILWAY COMPANY.

[19 WASHINGTON, 518.]

MANDAMUS—DEMAND AS A PREREQUISITE TO A SUIT FOR.—Where the duty to be performed is of a public nature or affecting the public at large, it is not necessary that a demand for its performance precede an application for a writ of mandate. Hence a writ of mandate to compel the operation of a street railway may issue, though a demand for such operation did not antedate the application for the writ.

MANDAMUS FOR THE PERFORMANCE OF A PUBLIC DUTY, RIGHT OF PRIVATE CITIZEN TO APPLY FOR.—Private citizens may move for a mandamus to enforce a public duty, not due to the government as such, and hence may apply for a writ to compel the operation of a street railway.

MANDAMUS.—A DEMAND FOR THE PERFORMANCE OF A PUBLIC DUTY need not precede the application for a writ of mandate, when it appears that the performance of such duty has been discontinued without any definite intention of resuming it.

MANDAMUS FOR THE PERFORMANCE OF A PUBLIC DUTY—INTEREST SUFFICIENT TO SUPPORT AN APPLICATION FOR.—One who owns, resides upon, and has improved prop-

erty near the end of a street railway line, relying upon its continued operation, has such an interest that he is entitled to maintain an application for a writ of mandate to compel the resumption of the operation of such line, if it has been discontinued.

STREET RAILWAYS—MANDAMUS TO COMPEL OPERATION OF.—If a corporation entitled to construct and maintain a street railway does construct and maintain it, and thereafter discontinues such operation, it omits a duty which it owes to the public and may, by a writ of mandamus, be compelled to resume the performance of such duty. It is no defense to the application for such writ that the city might, on proper proceedings, forfeit the franchise of the railway.

MANDAMUS TO COMPEL OPERATION OF AN UNPROFITABLE LINE OF RAILWAY.—The fact that the operation of a street railway has proved unprofitable constitutes no defense to an application for a writ of mandate to compel the resumption of such operation. The railway corporation cannot retain its franchise, and, at the same time, refuse to perform its duties.

FRANCHISE, WANT OF AS A DEFENSE TO AN APPLICATION FOR A WRIT OF MANDATE.—A street railway corporation which has for several years continuously and without objection occupied the streets of a municipality for its railway purposes cannot resist an application for a writ of mandate to compel it to continue the operation of such railway on the ground that it has no grant of a franchise from such municipality. Under these circumstances the city could not, as against the railway, raise the objection of the absence of such grant; neither can the railway raise it against the city.

Thomas C. Griffitts for the appellant.

Graves, Wolf & Graves, for the respondent.

519 REAVIS, J. Application by relator for a writ of mandamus to compel the defendant, a street railway company, to operate a line of street railway to Bell Park addition to the city of Spokane. The alternative writ, founded on the affidavit of relator, was demurred to by the defendant, and, upon the overruling of the demurrer by the superior court, defendant answered denying some of the facts stated in the affidavit and setting up new matter, to which reply was made by relator. Upon the issues raised a trial was had before the court without the intervention of a jury, and findings of fact made by the court. Defendant excepted to a number of the findings, because not sustained by the evidence, but we find substantial evidence to sustain each finding of the court, and, as this is a law action, the findings of fact by the court have the same force and effect as a verdict of the jury, and this court cannot, therefore, weigh conflicting testimony in the case.

The material facts found by the court are, substantially, that about the 17th of April, 1888, the Ross Park Street Railway Company was incorporated under the laws of the state, for the

purpose of constructing, equipping, operating, and maintaining a system of street railways in the city and county of Spokane, for the transportation of freight and passengers, such railways to be operated by steam, horses, or electricity, and likewise to borrow money and to secure the payment of the same by mortgage on its property and franchises. That subsequent to the incorporation, and from time to time until the spring of 1892, the Ross Park Street Railway Company, by building, leasing, and purchasing, operated a line of street railway commencing at the corner of [520] Howard and Riverside avenue in the city of Spokane, running thence along Howard street to Front street; thence on Front street to Olive street; thence east on Olive street to Hamilton street; thence north upon Hamilton street to Illinois avenue; thence east and northeasterly on Illinois avenue to C street; thence north on C street to Diamond street; and thence east on Diamond street to the northeast corner of block 1 of Bell Park addition to Spokane. That all of the streets mentioned were within the corporate limits of Spokane, to and including C street, and the remainder of the streets were in platted additions to the city. The line of railway extends to the intersection of Illinois avenue and Hamilton street near a point known as Martha avenue, to the town of Hillyard. The Hillyard line was built by a separate corporation known as the Arlington Heights Street Railway Company. Subsequently, in the year 1894, the defendant, through a corporation known as the Washington Water Power Company, acquired control of all the lines of Ross Park Street Railway Company and of the Arlington Heights Street Railway Company, and operated the same thereafter, until May, 1897, as one system. At that date a sale was made of all the lines of the Ross Park Street Railway Company by foreclosure of a mortgage executed to the Franklin Trust Company to secure payment of bonds, at which sale the Franklin Trust Company became a purchaser, buying all the property rights and franchises along the lines and appertaining thereto. On the same day a lease was executed by the Franklin Trust Company to defendant, by which the defendant covenanted to operate the said lines and pay, as rent therefor, one hundred per cent of the gross earnings to the Washington Water Power Company, the line of street railway running from Illinois avenue to the northeast corner of block 1 of Bell Park addition being expressly mentioned [521] and described in the lease, and being a portion of the line covenanted by the defendant in the lease to be by it run and operated. Thereupon defendant entered up-

on, and continued under the lease to operate, all the said lines of street railway until a few days before the commencement of this action in December, 1897, when it discontinued that portion of the line from Illinois avenue to Bell Park addition. That at all times during the operation of these lines they were operated as one system, under one management, and passengers paid but one fare for the entire trip. In December, 1897, a short time before the commencement of this action, the defendant ceased to operate that portion of the railway line extending from the intersection of Illinois avenue and Hamilton street, at Martha street, to Bell Park, which in the findings of fact is designated as the Minnehaha Park line. Its poles, wires, and tracks were, however, left in the street, and have been left there ever since, and the defendant has declared no intention to remove the same or not to recommence the operation of the line at some future date. There are about forty families living reasonably adjacent to the Minnehaha Park line, who are in the habit of using the same for street-car facilities. There were daily carried over this line from eighty to one hundred and twenty people. A large number of these people have built houses there, improved their lands and yards and taken up their residence there, because of the street-car facilities afforded by said line. The relator lives adjacent to this line, and several years ago commenced to reside there, and owns considerable property, which he has improved, relying upon the facilities afforded by this street railway line. No franchise was ever granted by the authorities of the city or county of Spokane to the defendant, or any of its predecessors in interest, for the occupation of Hamilton street, C street, or Diamond street. At [522] the time the line along Hamilton street was built, Hamilton street was not within the city limits. In 1891 the addition within which lies Hamilton street was included within the limits of the city. C street and Diamond street have not yet been included in the corporate limits, but all the streets mentioned are within platted additions to the city of Spokane. Hamilton street was dedicated by the persons along the northeast addition to Ross Park addition, and in the dedication of the streets in that addition the dedicators reserved the exclusive right to lay street railways along the streets, and, prior to the building of the line, the defendant, or its predecessors in interest, received permission from the dedicators and owners of the property along the street to lay the same. Since Hamilton street has come within the city limits, the corporate authorities have not interfered with the occu-

pation of the street by the railway company, and it has been in the undisputed use and occupation thereof. Along C street and Diamond street, a like reservation was contained in the dedication of the additions through and along which these streets ran, but no permission has been obtained from the dedicators or the adjacent property owners by the street railway company or its predecessors in interest to occupy said streets. It has, however, continuously occupied the same since 1892, and no objection has ever been made, so far as appears, by the county authorities, and at the time of ceasing to operate said line it was in undisturbed use and occupation of the said streets. All of the Minnehaha Park line and all of the Ross Park line run along and upon public streets of the city of Spokane, and public streets of additions thereto dedicated according to statute as public highways. The system operated by the defendant includes the major portion of the street railway mileage in the city of Spokane. It is not found what is the actual cost of operating the Minnehaha Park line. The [523] court found that a half-hour service on the Minnehaha Park line, run in connection with the Ross Park line, is a reasonable operation of the road, and is such an operation as the company has maintained for a period of over five years. No demand was made by any person upon the defendant to continue or resume the operation of the line. Upon the findings of fact the superior court entered judgment awarding a peremptory writ of mandamus commanding the defendant to run and operate an electric car or cars on that portion of this road in the city of Spokane and additions mentioned and described in the findings of fact as the Minnehaha Park line.

1. It is urged by the defendant, appellant here, that, no demand having been made upon it to resume the operation of its line, the action cannot be maintained. It is true that, upon the necessity of a previous demand and refusal to perform the act which it is sought to coerce by mandamus, the authorities are not altogether reconcilable. Mr. High says: "The better doctrine, however, seems to be that which recognizes a distinction between duties of a public nature, or those which affect the public at large, and duties of a merely private nature, affecting only the rights of individuals. And while in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by mandamus, in the former class, the duty being strictly of a public nature, not affecting individual interests, and there

being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the laws itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal": High on Extraordinary Legal Remedies, 2d ed., sec. 13; see, also, sec. 41.

In Union Pacific R. R. Co. v. Hall, 91 U. S. 343, there was under consideration an application by private parties to [524] compel the Union Pacific Railroad Company to operate its line as one continuous system into the town of Council Bluffs, Iowa. It was urged that these parties could not lawfully be relators in the suit, but it should have been brought by the attorney general of the United States, or the district attorney of the district of Iowa, because the object of the suit was to compel the performance of a public duty. The court concludes: "There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer." In consonance with these views may be mentioned State v. County Judge, 7 Iowa, 186; Virginia v. Rives, 100 U. S. 313; Attorney General v. Boston, 123 Mass. 460.

In Northern Pac. R. R. Co. v. Territory, 3 Wash. Ter. 303, it was said by the court: "No demand for the facilities required was ever made upon the company. That a demand would be necessary as a foundation of proceedings of this nature to establish a mere private right is conceded; but it is claimed by appellee that this was a question of public right, and that the company was neglecting to perform a duty which it owed to the public, and that in such a case a demand was not necessary. We think this claim is established by the facts and law of this case."

It may be noted that appellant did not deny that it had discontinued the operation of its street railway line indefinitely. The rule which requires a demand to be made before application to the court for a writ of mandate is founded upon reason; that is, it is unjust that defendant should be subjected to the payment of costs for a failure of some duty which it was willing to perform, had it been requested to do so.

[525] In Attorney General v. Boston, 123 Mass. 460, the supreme court of Massachusetts said: "But where a municipal corporation or board has distinctly manifested its intention not to perform a definite public duty, clearly required of it by law, no demand is necessary before applying for the writ."

The appellant's duty was a public one, due to the public, if

due at all, and therefore falls within the rule announced by the best authority. Upon the facts found, it was not absolutely necessary for the relator to make a demand for the operation of the line.

2. It was also suggested that the relator has not such interest in the subject matter of the action as will enable him to maintain the action. It is shown, however, he has a material, individual interest in enforcing the performance of a duty to the public: Union Pac. R. R. Co. v. Hall, 91 U. S. 343; Loader v. Brooklyn Heights R. R. Co., 14 Misc. Rep. (N. Y.) 208; 35 N. Y. Supp. 996; Savannah etc. Canal Co. v. Shuman, 91 Ga. 400; 44 Am. St. Rep. 43.

3. It is maintained by appellant that the facts failed to show any legal duty which it as a corporation is bound, either by law or its charter, to do or perform. The statute regulating mandamus in this state (Ballinger's Code, sec. 5755, Laws 1895, sec. 16, p. 117, is as follows: "It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

High's Extraordinary Legal Remedies, section 1, defines the writ as follows: [526] "The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the style or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law."

The controversy is whether, under the principles of the common law, a corporation authorized to transact the business which appellant is authorized to do, and which it has actually transacted, in the acquisition and operation of its street railway lines, owes a duty to the public to continue the operation. The franchise was granted to appellant by the state, not for its profit alone or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and intercourse for the public. It is a common carrier: York etc. R. R. Co. v. Winans, 17 How. 30; Booth on Street Railway Law, sec. 1;

Talcott v. Pine Grove Tp., 1 Flip. 120; 23 Fed. Cas. 653 (No. 13735). It was granted the power of eminent domain, a part of the sovereignty of the state, and, with the consent of the municipalities, it may lay its tracks over the public streets and highways. Such corporations, then, may not, by their own acts, disable themselves from performing the functions which were the consideration for the public grant: Thomas v. Railroad Co., 101 U. S. 71.

The opening of a highway or ferry, and the common carriage of persons or property over them, was at common law a franchise and a matter of governmental concern. It was a part of the subjects in immediate possession of the sovereign power, and to exercise which demanded a special grant or charter from the sovereign. Such avocations, in their nature and history, are unlike the private avocations of milling, hotel keeping, and traffic, which may all be pursued at [527] pleasure, unless restrained by the exercise of police power. Judge Kent says, in volume 3 of his Commentaries, page 458, that there are certain franchises which are understood to be royal privileges in the hands of a subject. The right to set up a ferry or road, and the taking of tolls, is one of them, and in this the public has an interest. In 2 Blackstone's Commentaries, 37, it is said that a franchise is a branch of the royal prerogative in the hands of the subject, such as the right of taking toll for a bridge, way or wharf. In Prosser v. Wapello County, 18 Iowa, 327, it was held by Judge Dillon that a public ferry franchise could only be conferred by the government, and must be founded on grant, license, or prescription. Ownership of the soil on each side of a stream does not confer the right to establish thereon without a grant a public ferry at which tolls are charged. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after, as well as before, the grant to be but a portion of the public interests. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, et cetera. And it is not in degree only that these franchises differ from mills and inns. The one is private property; the other is a public function, which originally resided in the government, and, when delegated to either persons or corporations, still retains the public use.

In Gates v. Boston etc. R. R. Co., 53 Conn. 333, it was said: "One public right consists in the continuous uses of the railroad, its franchise and corporate property, in the manner and for the purposes contemplated by the terms of the [528] charter. All these corporate franchises and this property are held subject to, and charged with, this obligation."

In an early case, that of King v. Severn etc. Ry. Co., 2 Barn. & Ald. 646, a writ of mandamus was issued to compel the restoration of a tramroad and the relaying of the track which the company had worn out. In State v. Hartford etc. R. R. Co., 29 Conn. 538, a railroad company was incorporated to construct and operate a railroad for the transportation of passengers and freight between certain main points. The road was constructed, and thereafter it discontinued operating its trains to one of the terminii. The court said: "We hardly know what doubtful principles of law are thought to be involved in the case. All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by mandamus to do it; and it will not be questioned that in the case of public highways, whether turnpikes or railroads, they are bound to keep them fit for use, and, in case of railroads, to keep them furnished with suitable cars, engines, and attendants, without which they could not be used at all."

The supreme court of Maine, in Railroad Commrs. v. Portland etc. R. R. Co., 63 Me. 269, 18 Am. Rep. 208, compelled the erection and maintenance of a depot for freight and passengers upon a line of railroad. The supreme court of the United States, in Union Pac. R. R. Co. v. Hall, 91 U. S. 343, upon the relation of private parties by mandamus, compelled the Union Pacific railroad company to operate its road as a continuous line from Council Bluffs westward. In Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 37 Am. St. Rep. 312, it was held that the performance of the duties which a street railway company owes to the public may be enforced by mandamus. [529] Three lines of street railway were operated in connection with a system of railways in the city of Topeka, and then discontinued, when the law was invoked. In San Antonio Street Ry. Co. v. State, 90 Tex. 520, 59 Am. St. Rep. 834, the supreme court of Texas held that, where a street railway company had undertaken the operation of its line upon certain streets, the public acquired a right to the operation of the lines which could be enforced by mandamus. It was also held that it was no defense to a writ of mandamus

that a city might forfeit its franchise for failure to continue to operate its cars over a portion of the line; and it was further determined that an answer which set up that the operation of the line was a continual loss to defendant, that the revenues received were not sufficient to pay the actual expenses of its operation, and that if it continued the operation of the line the value of its whole property would be consumed and it would become bankrupt, was no defense, for the reason that, so long as it retained its franchise it would not be allowed to urge, as an excuse for failure to perform the duties imposed by it, that it was nonprofitable.

A similar principle is sustained with regard to a canal company in Savannah etc. Canal Co. v. Shuman, 91 Ga. 400, 44 Am. St. Rep. 43, where a peremptory writ of mandamus was issued against a canal company requiring it to keep its canal in a navigable condition. It was also held that the answer of the defendant, that the operation of the canal was unprofitable, was no defense; that it could not retain its franchises and refuse to perform its duty.

In Haugen v. Albina Light etc. Co., 21 Or. 411, it was determined that a corporation formed for the purpose of supplying a city and its inhabitants with water, and which had laid its pipes in the streets of the city [530] for that purpose, could be compelled by mandamus to supply persons living along the streets with water.

Counsel for appellant has called our attention to two cases to support the position that mandamus cannot be maintained here; one, People v. Rome etc. R. R. Co., 103 N. Y. 95. But the statute of New York provided that a peremptory writ of mandamus is only authorized, in the first instance, "where the applicant's right to a mandamus depends only upon questions of law." In that case the material averments of the petition of the attorney general were put in issue, and the facts were that a short line of road was abandoned where there was another line, only two miles longer, that accommodated the same public. The court said: "The present line [in operation] is a little longer than the one originally adopted and slightly varying therefrom, but it accommodates the people of the state and the people of the locality substantially as well as the line originally adopted. Suppose two roads were consolidated and the lines of the two between two places were parallel and near to each other, could the consolidated road be compelled by mandamus to operate both lines or could it discharge its duty to the public by using only one

line?" And the court concluded that one only was sufficient in that case. The conclusion in no wise negatives the established principle of the public duty owed by the railroad company.

The other authority is State v. Canal etc. R. R. Co., 23 La. Ann. 333, which was an application for a writ of mandamus to compel the officers of a street railway company to collect from subscribers to the capital stock of the corporation their delinquent subscriptions. The relators were stockholders. The defense was, that the amounts to be paid and the times of payment were, by the charter and agreement signed by the relators, [531] left to the discretion of the board of directors, and the provision was that "five per cent of each subscription shall be payable at the signing of these articles, and the balance shall be paid at such times and in such amounts or installments as the board of directors may order." The court there held that, as a general rule, a writ of mandamus would not lie to compel an officer or a company to do an act coming within the range of their duties, where the law or the charter under which they act has vested in them a discretion to do or not to do it. The case is clearly not in point here, for no discretion is vested by our laws in the charter of a street railway company that would authorize its discontinuance of a street railway line which it had already established and operated. Permanency in the service of the public in a reasonable manner is an essential duty in all such avocations.

4. But it is also urged by counsel for appellant that it had no grant or privilege or franchise from the city or county to operate its tracks upon the public streets, and has simply a license from the owners of the additions through which these streets ran. But it has continuously occupied these streets, since 1892, with its lines, and no objection has been made by the city or county authorities to such occupation, and it is in undisturbed use and occupation of these streets. The city could not object now: Spokane Street Ry. Co. v. Spokane Falls, 6 Wash. 521. We do not think it can urge this objection so long as it is undisturbed in its use of the streets. We conclude that a corporation of the nature of appellant, receiving its franchises from the state and entering upon the enjoyment of them, cannot cease to perform the functions which were the consideration for the grant of such franchises without the consent of the granting power. The question of the public convenience is one which appeals to the discretion [532] of the court. The distinction between a franchise granted by the state of the right to exist and engage in peculiarly

favored occupations, and upon which special and peculiar burdens are imposed, and the license granted by a municipality to such corporations to transact their business within its limits, was discussed by this court in a recent case: Commercial Electric Light etc. Co. v. Tacoma, 17 Wash. 661. It was there stated that an electrical company was a quasi public corporation, and might not, without the consent of the state, disable itself from the performance of its public duties by transferring its corporate privileges and franchises, but that it might transfer to others the privileges granted by the municipal corporation to perform its business in the public streets within the limits of the city: See, also, Belleville v. Citizens' Horse Ry. Co. 152 Ill. 171.

In platted additions to a town, when streets are laid out thereon, the fee belongs to the public: Ballinger's Code, sec. 1276; Elliott on Roads and Streets, 87; Des Moines v. Hall, 24 Iowa, 234.

If any condition is annexed to such dedication, the condition falls, but the grant stands: Elliott on Roads and Streets, 88, 109, 110; Des Moines v. Hall, 24 Iowa, 234, 241; Richards v. Cincinnati, 31 Ohio St. 506.

The judgment of the superior court is affirmed.

Anders and Dunbar, JJ., concur.

MANDAMUS—DEMAND AS PREREQUISITE TO ISSUANCE. There is some difference of judicial opinion as to the necessity for a demand and refusal before issuing mandamus. Some courts hold that the writ ought in no case to issue without proof of demand and refusal. While other cases recognize a distinction between duties of a public nature, affecting only the public at large, and those of a private nature, especially affecting the rights of individuals. And they hold that in the latter class of cases a demand must be made, but that in the former no demand is necessary. The law itself stands in the place of a demand in such cases, and the neglect to perform the duty is equivalent to a refusal: See monographic note to Dane v. Derby, 89 Am. Dec. 731.

FRANCHISES — FORFEITURE OF — MANDAMUS TO ENFORCE—PARTIES.—Railroad franchises are granted for the benefit of the public and may be annulled or forfeited for nonperformance of their conditions: Tower v. Tower etc. St. Ry. Co., 68 Minn. 500; 64 Am. St. Rep. 493, and note. A forfeiture of a franchise must in general be adjudged in direct proceedings instituted by the state: See monographic note to State v. Atchison etc. R. R. Co., 8 Am. St. Rep. 193, on the forfeiture of corporate franchises. Mandamus lies to compel a street railway company to perform the duty which it owes to the public to operate its road in accordance with the provisions of an ordinance under which the road was constructed: Potwin Place v. Topeka Ry. Co., 51 Kan. 609; 37 Am. St. Dep. 312, and monographic note. Compare San Antonio Street Ry. Co. v. State, 90 Tex. 520; 59 Am. St. Rep. 834. Unless the public interests have been injuriously affected, a private individual cannot insist by

mandamus that a public right or duty be enforced: Crane v. Chicago etc. Ry. Co., 74 Iowa, 330; 7 Am. St. Rep. 479. But where the object is to enforce a public duty not due the government as such any private person beneficially interested may, in some states, resort to mandamus: Note to Crane v. Chicago etc. Ry. Co., 7 Am. St. Rep. 484, 485. A private person who applies for mandamus must have an interest distinct from that of the public at large: Wellington's Case, 16 Pick. 87; 26 Am. Dec. 631.

SAVAGE *v.* STERNBERG.

[19 WASHINGTON, 679.]

INJUNCTION—PERSON NOT PARTY TO A SUIT CANNOT BE BOUND BY.—The fact that an injunction has been issued to a municipal corporation and its treasurer forbidding the payment of city warrants does not justify the refusal of that officer to pay such warrants on the demand of the owner thereof, when neither he nor any of his predecessors in interest were parties to the suit in which such injunction issued.

A JUDGMENT IS VOID AND ENTIRELY WORTHLESS, and no one is bound to obey it, if the court pronouncing it had not jurisdiction over the subject matter of the action or of the persons sought to be bound by it.

AN INJUNCTION BASED ON A VOID JUDGMENT or decree is itself void and not entitled to obedience.

MANDAMUS—PARTIES TO APPLICATION FOR.—To a proceeding to compel a city treasurer to pay warrants issued by it, the city is not a necessary party.

A PRESUMPTION OF NONPAYMENT OF CITY WARRANTS arises from their having been executed in due form and their remaining in the possession of a private person claiming to own them.

MANDAMUS IS THE PROPER REMEDY to compel a city treasurer to pay warrants properly drawn upon him.

O. G. Ellis and A. H. Denman, for the appellant.

W. H. Pritchard and Walter M. Harvey, for the respondent.

679 ANDERS, J. This was an application for a writ of mandate to compel the treasurer of the city of Tacoma to pay five certain warrants. It is shown by the averments of the petition and affidavit that the city was indebted to the 680 Fox Island Clay Works, and that the warrants in question were issued on account thereof; that they were issued to the payee therein named on September 18, 1893, and that they were presented to the city treasurer for payment on September 21, 1893, and indorsed by him, "not paid for want of funds"; that they were subsequently delivered to the appellant for value, and that appellant is now the owner and holder of the same; that the treasurer has

money in his hands sufficient to pay the warrants, and applicable to the payment thereof. It is also alleged in the petition and affidavit that, prior to the commencement of this action, the payment of said warrants was demanded of the city treasurer, and that the said treasurer refused to pay said warrants, because he and the city of Tacoma had been enjoined from paying said warrants in a certain action in the superior court of Pierce county wherein one D. F. Murry was plaintiff and the said W. A. Sternberg and the city of Tacoma were defendants; that in said action in the superior court of Pierce county, wherein said Murry was plaintiff and this defendant and others were defendants, the city of Tacoma, and this defendant and others, were enjoined from paying any general fund warrants issued by the said city of Tacoma between the sixteenth day of August, 1892, and the nineteenth day of April, 1894, on the ground that all warrants issued between said dates had been once paid; that the said warrants were erroneously included in this injunction, and have never been paid; that neither the plaintiff herein, nor any person interested in the warrants herein sued upon, was a party to the action wherein said Murry was plaintiff. A demurrer was interposed to the petition and affidavit on the grounds: 1. That there is a defect of parties defendant; 2. That the petition and affidavit do not state facts sufficient to authorize the issuance of the writ; and 3. That plaintiff has a plain, speedy, and adequate [681] remedy at law. This demurrer was sustained by the court, and, the plaintiff having elected to stand upon her complaint, judgment was rendered against her for costs, and dismissing her action, from which judgment this appeal is taken.

The principal question discussed in the briefs of counsel, and, in our view of the case, the only one requiring an extended discussion here, is whether the injunction was a sufficient excuse for the refusal on the part of the city treasurer to pay appellant's warrants. That it was sufficient is stoutly asserted by counsel for the respondent, and in support of their contention the following cases are cited: Ohio etc. R. R. Co. v. Commissioners of Wyandot County, 7 Ohio St. 278; State v. Kispert, 21 Wis. *387, 392; Ex parte Fleming, 4 Hill, 581. The decisions in these cases seem to have been based solely upon the proposition that the court would not place the defendant between two fires by subjecting him to contradictory orders. It is said in the Ohio case that, if the writ of mandate should issue, the defendant would be guilty of contempt if he did not obey it, while, on the other hand, he would be equally in contempt for disobeying

the decree of injunction. While we entertain the greatest respect for the learning and ability of the courts which rendered these decisions, we are not disposed to follow them, for the reasons: 1. That they impliedly, at least, seem to concede that a person may be bound by a judgment although he was not a party to the action in which it was rendered; and 2. That they in effect concede, contrary to the rule announced by this and other courts, that a violation of a void order or judgment will subject the party disregarding it to punishment as for contempt.

In State v. Milligan, 3 Wash. 144, this court held that an officer of the city of [682] Tacoma was not bound by an injunction of the superior court which was void for lack of jurisdiction in the court. It is true that, in that case, the court had not jurisdiction of the subject matter, but the result would have been the same had there been want of jurisdiction of the person. Upon this subject, Mr. Freeman, in his work on Judgments, fourth edition, section 116, says: "If the want of jurisdiction over either the subject matter or the person appears by the record, or by any other admissible evidence, there is no doubt that the judgment is void." And in the following section he states what we deem would be held to be good law everywhere, that: "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers."

And Judge Van Fleet declares the law to be that, if a judgment is lacking either in jurisdiction of the subject matter or of the person, it is entirely worthless, no matter in what court rendered, and no one is bound to obey it. The oath of all officers compels them to disregard it. And he further says that a few cases hold that want of jurisdiction over the person does not make the judgment of the superior court void, but they are out of line and wrong on principle: Van Fleet on Collateral Attack, sec. 16. And in accordance with this principle this court, in the case of Stallcup v. Tacoma, 13 Wash. 152, 52 Am. St. Rep. 25, observed: "The remaining allegations of the complaint are directed to questions which, in our view, ought not to be considered by a court of equity without having all of the parties directly [683] affected by the decree before it. Such a decree could have no binding force as against strangers to the record."

That a party or officer is not bound by a void injunction or order of the court and will not be punished for violation thereof, was also decided in the following cases: In re Sawyer, 124 U. S. 200; Ex parte Fisk, 113 U. S. 713; In re Ayers, 123 U. S. 443; Walton v. Develing, 61 Ill. 201; Andrews v. Knox County, 70 Ill. 65; Darst v. People, 62 Ill. 306; Lamb v. Railroad Co., 39 Iowa, 333; Salling v. Johnson, 25 Mich. 489; Smith v. People, 2 Colo. App. 99. And that it is the duty of an officer to obey the law, rather than the order of the court, is expressly announced in Walton v. Develing, 61 Ill. 201, in which the court said: "The court, as well as the inferior officer, must be governed by the law. When the law imposes a positive duty upon a public functionary, and a court commands him not to perform it, he must obey the law and disobey the writ of the court."

Nor is our view that the injunction was not available as a defense in this case without the support of high authority elsewhere. In Mayor v. Lord, 9 Wall. 409, which was a mandamus proceeding to compel the mayor and aldermen of the city of Davenport to levy a tax to pay a judgment obtained against the city by the plaintiffs, and in which the defendants pleaded that they had been enjoined from levying the tax, the court said: "The injunction cannot avail the respondents. The relator was not a party to the proceeding."

And in Smith v. Commissioners, 2 Woods, 596, which was a mandamus to compel the commissioners to levy and collect a tax for the payment of coupons detached from [684] bonds, the court held that an injunction in which the plaintiffs were not parties, restraining the commissioners from levying and collecting any tax to pay said indebtedness, was not a good defense to the proceeding. In the course of his opinion, Justice Bradley of the supreme court, sitting as circuit justice, used the following language with respect to the injunction: "The court of county commissioners of Tallapoosa county is under injunction, it is true, not to do the very thing which a mandamus from this court would require them to do. But they cannot be embarrassed by this, because the act of the law, as well as the act of God, can always be pleaded in excuse of performing or not performing an act. The mandamus of this court would be an act of the law, which could thus be pleaded by the commissioners in excuse of not obeying the injunction, and such an excuse will undoubtedly be accepted by the chancery court. This is so, not because this court has any superiority over that court, but from the nature and circumstances of the case, and particularly from

the fact that the plaintiffs in this case were not parties in that court. Had they been parties, and had they instituted suit and obtained judgment against the injunction of the chancery court, they would be guilty of contempt, and answerable therefor to that court. But, not being parties, they are not affected by the proceedings had therein, and cannot be deprived of the execution of their judgments."

It seems to us that the above states the true doctrine upon this question, and the same principle was announced on the authority of Mayor v. Lord, 9 Wall. 409; in Clews v. Lee County, 2 Woods, 474. In State v. Dubuclet, 26 La. Ann. 127, which was a proceeding by mandamus to compel the state treasurer to pay certain state warrants, it was likewise held that the plea that the treasurer had been enjoined from paying them was insufficient: See also, United States v. Council of Keokuk, 6 Wall. 518.

685 It is suggested by the learned counsel for the respondent that there is a defect of parties appearing upon the face of the petition and affidavit, but we think otherwise. We must presume that the claims evidenced by these warrants were properly allowed by the city council and audited by the comptroller, for the presumption is that all officers perform their duties. And the fact that these warrants were signed by the president of the council and the city clerk, countersigned by the comptroller, endorsed by the city treasurer, and are now in the possession of the appellant, raises the presumption that they have not been paid, and it is the duty of the treasurer, enjoined by the law under which he is acting, to pay such warrants, and, if he has any defense it is incumbent upon him to establish it. In Bacon v. Tacoma, 19 Wash. 674, we endeavored to show that, under our statute, mandamus is the proper remedy to compel the city treasurer to pay warrants properly drawn upon him, and that in such a proceeding all essential matters of fact may be tried and determined, and the authorities there cited are applicable here. It is therefore unnecessary to enter into a discussion of these questions at this time.

For the foregoing reasons the judgment of the court below is reversed, and the cause remanded, with instructions to overrule the demurrer.

Gordon and Dunbar, JJ. concur.

JUDGMENTS—VOID FOR LACK OF JURISDICTION.—A judgment showing upon its face that the court rendering it had no jurisdiction, either of the person or of the subject matter, is abso-

lutely void: Note to Higgins v. Bordages, 53 Am. St. Rep. 778; Springer v. Shavender, 118 N. C. 33; 54 Am. St. Rep. 708, and note.

MANDAMUS TO MUNICIPAL CORPORATIONS.—The courts of this country have been liberal in granting relief by mandamus against public corporations and their officers in all cases where a plain and imperative duty is imposed by law, so that they are merely called upon to act in a ministerial capacity, without having to exercise their judgment as to whether or not the duty should be performed: See monographic note to Dane v. Derby, 89 Am. Dec. 737. See Olney v. Harvey, 50 Ill. 453; 99 Am. Dec. 530, and note.

CASES

IN THE

SUPREME COURT

OF

WEST VIRGINIA.

HALL *v.* NORFOLK AND WESTERN R. R. CO.

[44 WEST VIRGINIA, 36.]

STATUTES—PENAL — DEFINITION—CONSTRUCTION.—A statute imposing a penalty or forfeiture for transgression of its provisions, or for doing a thing prohibited, is penal, and must be strictly construed.

RAILROAD COMPANIES — OVERCHARGES — PENAL STATUTE.—Statutes imposing penalties for overcharges in freight or passenger rates by railroad companies are penal in their nature, and must be strictly construed.

PENALTY—DEFINITION.—A penalty is in the nature of a punishment for the nonperformance of an act, or for the performance of an unlawful act; and involves the idea of punishment, whether enforced by a civil or criminal proceeding or action.

AGENCY—LIABILITY FOR PENAL OR CRIMINAL ACT OF AGENT.—A principal is liable for the acts of his agent done in the course of the performance of the principal's business, whether the agent is authorized or not, so long as such acts are civil in their nature; but he is not liable for criminal or penal acts of his agent unless done by his authority, assent, or approval.

RAILROAD COMPANIES—OVERCHARGES BY AGENT—PENAL STATUTE.—A railroad company is not liable for the penalty or punishment imposed by statute for making overcharges in freight or passenger rates, when such overcharge is made by its conductor, unless the company has authorized or approved his act.

A. W. Reynolds and Johnston and Hale, for the appellant.

[36] BRANNON, J. Hall brought an action of debt against the Norfolk and [37] Western Railroad Company to recover the fixed penalty of five hundred dollars imposed upon railroads by clause 5, chapter 54, section 82 of the Code of 1891, for overcharge of rates, and recovered judgment, and the company sued

out this writ of error. The first question of decisive importance is whether the act of the conductor in making the alleged overcharge binds the company, in the absence of evidence that it was ordered or ratified by it. It is clear that the principal is liable for a tort done by its agent, in an action for the recovery of damages to compensate one injured by such tort, when committed in the course of the agent's employment, though the principal did not authorize, participate in, or ratify the act, and though it was done without his authority, and even against his orders. This liability is based, not on the idea of the agent's authority, but on public policy. One without fault is hurt by another's agent in the course of the principal's business, and that principal must make reparation. The test is whether the act was done in the course of the performance of the principal's business, not whether the agent had authority to do the act: 1 Am. & Eng. Ency. of Law, 2d ed., 1151; 1 Elliott on Railroads, secs. 213, 214; Gregory v. Ohio Riv. R. R. Co., 37 W. Va. 606; Gillingham v. Ohio etc. R. R. Co., 35 W. Va. 588, 592; 29 Am. St. Rep. 827. It is different in cases of contract. The act must be within the authority, there. It is also clear that, while the principal is liable civilly for the acts of the agent, he is not liable criminally. He is liable for acts civil in their nature, not those criminal or penal in nature, unless done by his authority or assent, or approval: 1 Am. & Eng. Ency. of Law, 2d ed., 1161; Lewis' case, 4 Leigh, 664. Such being the law, what is the cast of the act done by the conductor in this case, if it was done? If an overcharge in passenger or freight rates is made by a railroad company, the act is made a misdemeanor by clause 15a of the Code, page 565, with very severe punishment; and for the act an indictment lies, and the fine goes to the state. For the very same act a penalty of five hundred dollars is given the party aggrieved, by clause 5, in addition to the fine to the state, and in addition to the right to recover the amount of excessive charge collected by the company, as this penalty is cumulative, and does not deprive the party [38] of his civil action for money had and received in wrong: 4 Elliott on Railroads, sec. 1564; 8 Am. & Eng. Ency. of Law, 934; Hutchinson on Carriers, sec. 756b. Thus, for mere compensation the wronged party has his civil action for money had and received for his wrong, and also a right to demand the five hundred dollar penalty. They are in their nature different things. No one would say that upon an indictment for the misdemeanor the act would be treated otherwise than a criminal act. The

very same act carries with it a penalty of five hundred dollars to the individual, not for compensation to him to redress his actual loss, but purely for punishment. In this case Hall was overcharged, if at all, only thirty-eight cents, on a ride of four miles; and of course, the penalty is not for compensation, but punishment. The act thus has two punitive penalties, one to the state, and the other to the individual, for one and the same act, which is a public wrong entailing two penalties. You cannot make two civil actions for compensating the party out of that act, but you can, out of one act of public wrong, make two penalties. The defendant has been held liable for the crime of its conductor, when it neither ordered it, nor ratified it, nor knew of it, but the act was against its published rates, and in violation of its directions to the conductor to collect only lawful fares by the tariff rates furnished him. If he did that act, he did it by mistake, or in violation of orders. I take it that the legislature did not intend to punish the corporation, if innocent, with such severe penalties. I can readily see that it is just and good policy to thus punish a railroad company for such wrong, if done by its authority or with its approval; but we ought not to give that liberality of construction to the statute which imposes such injustice, because it is a highly penal statute, and its words do not make the company liable for unauthorized acts of agents, nor does reason or justice call for it; and penal statutes are to be strictly construed, and applied only to cases plainly within them and their reasonable intent. Under this principle, it must be shown that the company ordered or approved the act, as it was held that the company must have approved running cars on Sunday, or authorized it, to make it liable for the penalty fixed for such act: State v. Baltmore etc. Ry. Co., 15 W. Va. 362, [39] 389; 36 Am. Rep. 803. There the acts of its officers did not bind it for the penalty, because it did not appear that the company authorized or approved the act. That case settles this one in favor of the defendant.

The latest work on railroads, of high and standard authority (Elliott on Railroads, sec. 715), says: "On the other hand, it is held that statutes relating to criminal offenses, and all statutes which impose as punishment any penalties, pecuniary or otherwise, for forfeitures of money or other property, or which provide for the recovery of damages beyond just compensation to the party injured, either recovered in a suit by the state, or a private individual, are penal, in the sense that they fall under the rule of strict construction. This is the only doctrine that

can be defended on principle." Statutes of the character involved in this case, imposing penalties for overcharges, have been held penal, and subject to rigid construction: Hines v. Wilmington etc. R. R. Co. (Freight Discrimination cases), 95 N. C. 434; 59 Am. Rep. 250; Louisville etc. R. R. Co. v. Commonwealth, 99 Ky. 132; 59 Am. St. Rep. 457. So a statute giving a penalty for leaving a gate swinging open over a highway was held penal in Allen v. Stevens, 29 N. J. L. 509. In Brooks v. Western Union Tel. Co., 56 Ark. 224, an act imposing a penalty for refusing to transmit telegrams over the line was held penal, and not to include the act of refusing to deliver a telegram after its transmission. The opinion very appropriately says (what is applicable to this case) that: "The statute is penal, and its terms cannot be extended beyond their obvious meaning. Where there is a doubt, such an act ought not to be construed to inflict a penalty which the legislature may not have intended. This is a familiar rule of construction. Applied to this case, it resolves the question in favor of the company, for it cannot be said that the language plainly implies the intention to visit a penalty for a refusal to deliver a message after it had been transmitted." All penal statutes are construed strictly, and not "extended by mere implication to include cases or acts not clearly described by the words": 23 Am. & Eng. Ency. of Law, 374, 375; 18 Am. & Eng. Ency. of Law, 270. "Penal statutes are those by which punishments are imposed for transgression of the law. They are construed strictly, and more or less so according to the severity of the penalty. [40] When a law imposes a punishment which acts upon the offense alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended it should extend further than his expression; and humanity would require that it should be so limited in construction": Sutherland on Statutory Construction, sec. 208. It does not make the statute any the less penal that the penaly is enforced by an action in form civil. That matter relates only to the procedure. A penalty "is in the nature of punishment for the nonperformance of an act or for the performance of an unlawful act. It involves the idea of punishment, whether enforced by a civil or criminal procedure": Anderson's Law Dictionary, 763, quoted in an excellent case on the subject, Woolverton v. Taylor, 132 Ill. 197; 22 Am. St. Rep. 521. Endlich on Interpretation of Statutes, sec. 331, says: "It is immaterial, for the pur-

pose of the application of the rule of strict construction, whether the proceedings for the enforcement of the penal law be criminal or civil. Thus, an act giving a party injured a civil action for the recovery of a penalty imposed upon a public officer for charging illegal fees is a penal act; so that the taking of excessive fees by a person, after the expiration of his office, for service done while in office, is beyond the reach of the act." In Virginia the statute against usury has been several times held to be penal, requiring proof beyond rational doubt: Brockenbrough v. Spindle, 17 Gratt. 21, 33.

I think that my construction of clause 5 is strengthened by looking at clauses 15 and 15a, as all are in pari materia, and in the same act. Clause 15 enacts that any willful violation of the act by any railroad corporation shall be deemed a forfeiture of its franchise. Would any reasonable person say that a paltry overcharge of thirty-eight cents, as in this case, by a conductor, without authority or approval of the company, would visit upon it the dreadful penalty of forfeiture of its franchise? You would not, by liberal construction, do this. Then why, for the very same act, impose the heavy penalty of five hundred dollars to the individual, not for compensation, but for punishment? Clause 15a enacts that "any railroad company or corporation their officers or agents, who shall charge, demand, or receive more than the lawful charges, for transportation [41] or travel upon their railroad, shall for each offense be guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred dollars or more than five hundred dollars." That means that where the corporation authorizes it, it shall be liable, but where it is the unauthorized act of the agent, he is liable. The agent or officer is not liable to the five hundred dollar penalty under clause 5—he is not mentioned there; and, to impose it on the corporation, it must be authorized, or approved. It must be its willful act, like the act required under clause 15, to lose its franchise. Indeed, it may be a question whether any officer's unauthorized act, whether he be high or low, could subject a corporation to these severe penalties—whether it would not require company action, or action by some one authorized to fix rates, to bind the company, for a mere subaltern could not.

Under these principles, error was committed, prejudicial to the defendant, upon the trial, in giving plaintiff's instructions 1 and 2, the former telling the jury that it was not incumbent upon the plaintiff to prove his case beyond a reasonable doubt, but by a

mere preponderance of the evidence; the latter stating that the mere collection of sixty cents by the conductor rendered the company liable. And error was committed in refusing defendant's instructions 1 and 3, the former instructing that if the conductor collected sixty cents, and the company had a schedule of rates for the government of its conductors in collecting fares from passengers, and a duplicate of it was furnished to the conductor, and it was against the rules of the company for the conductor to charge the plaintiff more than the rates fixed by said schedule, and if said rates were not more than the law allowed, then the jury must find for the defendant; and No. 3 instructing that, before the jury could find for the plaintiff, they must believe from the evidence, to the exclusion of every reasonable doubt, that the company charged the plaintiff more than was allowed by law, and that notwithstanding the conductor charged sixty cents, which was more than the law allowed, if the jury believed that the rules of the company did not allow the conductor to charge the plaintiff more than was allowed by law, and that he acted in violation of [42] the rules of the company, the act of the conductor was not the act of the company. The court erred in not setting aside the verdict of the jury, as there was no evidence tending to show that the company authorized or ratified the act, and, on the contrary, it was clearly shown to be against the rules of the company. I think that there was no error in rejecting pleas 1 and 2, fixing one year as a limitation. If any statute applied, it would be five years, under the Code of 1891, chapter 104, section 12. Reversed and new trial granted.

STATUTES—PENAL—CONSTRUCTION.—Penal statutes must be strictly construed, and cannot be extended to cases not clearly covered thereby: People v. Nelson, 153 N. Y. 90; 60 Am. St. Rep. 592, and note. The test to determine whether a statute is penal is to inquire whether its main purpose is to give compensation for an injury or to punish a wrongdoer: Adams v. Fitchburg R. R. Co., 67 Vt. 76; 48 Am. St. Rep. 800, and note. A penalty is a punishment which the law exacts for its violation, and may be fine, forfeiture, deprivation of office, or other right, or by any other means sanctioned by law: State v. Wallbridge, 119 Mo. 383; 41 Am. St. Rep. 663, and note.

AGENCY—LIABILITY FOR CRIMES OF AGENT.—A principal, to be punished criminally, must have directly participated in the act, or have given such assent or concurrence thereto as would involve him morally in guilt of the act: Commonwealth v. Nichols, 10 Met. 259; 43 Am. Dec. 432, and note; Commonwealth v. Gillespie, 7 Serg. & R. 469; 10 Am. Dec. 475; Hunter v. State, 1 Head, 160; 73 Am. Dec. 164.

MASTER AND SERVANT—LIABILITY FOR SERVANT'S CRIMES.—The master is not punishable criminally for the offenses

of his servant, unless they were committed by his command or with his assent: Hipp v. State, 5 Blackf. 149; 33 Am. Dec. 463; Commonwealth v. Stevens, 153 Mass. 421; 25 Am. St. Rep. 647, and note; Gulf etc. Ry. Co. v. Reed, 80 Tex. 362; 26 Am. St. Rep. 749; Knox v. Eden Musee American Co., 148 N. Y. 441; 51 Am. St. Rep. 700. See McKinley v. Chicago etc. R. R. Co., 44 Iowa, 314; 24 Am. Rep. 748; monographic note to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 85.

GROGAN v. EGBERT.

[44 WEST VIRGINIA, 75.]

RECEIVERS—FOREIGN—RIGHT TO REMOVE ASSETS.—A foreign receiver of a dissolved foreign partnership has no right to remove the funds of such firm out of the state, to the detriment of resident creditors thereof, or of separate creditors of the firm members, until he shows that the firm is insolvent and that such funds are necessary to satisfy partnership debts, regardless of any claim thereto by the debtor partner.

RECEIVERS—FOREIGN—RIGHT TO PROPERTY.—A foreign receiver cannot assert title to property within the state, as against the attachment of a resident creditor, especially when the sole purpose of the receivership is to enable the debtor to hinder, delay, and defraud resident creditors.

R. W. Monroe, for the appellant.

H. B. Gilkenson, for the appellees.

[76] DENT, J. On writ of error to a judgment of the circuit court of Kanawha county, entered on the tenth day of January, 1895, in case of interpleader to try the right to property attached. On the fifteenth day of May, 1892, and prior thereto, Egbert and Sears, composing the firm of Egbert & Co., at Brownstown, West Virginia, were engaged in buying and selling flour, and feed, et cetera, buying their flour from the Dresden Milling Company, a firm composed of Jacob Walters, William Snyder, and the same Fred H. F. Egbert, and doing a milling business at Dresden, Ohio, Egbert owning a half interest therein. On the fifteenth day of May, 1892, plaintiff, Grogan, purchased of Egbert & Co. one hundred and thirty-three barrels of flour, for which Grogan paid in hand, by his negotiable note, the sum of five hundred and forty-four dollars and twenty cents; and this flour turned out to be musty and unmerchantable. The firm of Egbert & Co. was dissolved on the fifteenth day of May, 1892, and never afterward sold flour anywhere. On the sixteenth day of May, 1892, on the petition of the partner, Egbert, owning one-half, and by the consent of the other two members of the firm, the court of common pleas of Muskingum county, state of Ohio, appointed F. W. Gasche, the plaintiff in this interpleader, the

receiver for the Dresden Milling Company, whose assets consisted of a mill, grain, flour, feed, et cetera, with directions to collect the debts of the firm, operate the flouring-mill, and make such purchases of grain as might be necessary to carry on the business, but without incurring any indebtedness. On or about the fifteenth day of August, 1892, this receiver, through his agent, Egbert, sold one hundred and twenty-five barrels of flour to De Gruyter, Fuller & Co., of Charleston, manufactured at the Dresden Mill, by the receiver, under the order of the Ohio court. The price of the flour sold was four hundred [77] and twenty-six dollars and sixty-three cents. The legal title to the flour while it remained in Ohio was in F. W. Gasche, the receiver. It does not appear that the firm of Egbert & Co. ever had any interest of any kind in this flour, but F. W. F. Egbert, of the firm of Egbert & Co., had been a member of the dissolved firm of the Dresden Milling Company. On the twentieth day of August, 1892, plaintiff, Grogan, brought his suit in trespass on the case, in assumpsit, in the circuit court of Kanawha county, for the breach of the warranty of the quality of the flour sold to plaintiff by Egbert & Co.; and on the sixth day of December, 1892, an attachment was taken out, and the De Gruyter-Fuller Company were designated on the attachment as persons indebted to and having in their hands and possession the effects of the firm of Egbert & Co., and of Fred H. F. Egbert and E. Sears individually; and on the same day this order of attachment was served on each of the members of the firm of the De Gruyter-Fuller Company. Thereupon defendant Egbert appeared, and entered the plea of not guilty. The issue was tried by a jury, who found for plaintiff the sum of three hundred and twenty-four dollars and twenty-four cents damages, upon which the court entered judgment.

On the twenty-ninth day of March, 1894, F. W. Gasche, as receiver, filed his petition, disputing the validity of plaintiff's garnishment, stating his claim to the debt due from the De Gruyter-Fuller Company as receiver, and the nature of his claim, and gave security for costs, as required by law; and on the twenty-first day of December, 1894, the court impaneled a jury to inquire into the receiver's claim, and try whether or not this debt due from the De Gruyter-Fuller Company was the property of F. W. Gasche, receiver, as claimed in his petition at the time the same was levied on. During the progress of the trial of this issue, the receiver, Gasche, introduced in evidence, over the objection of plaintiff, Grogan, the record of the proceedings of the

court of common pleas of Muskingum county, Ohio. This transcript was duly certified, and was certainly admissible and relevant, as showing the fact and time of his appointment, and the extent of the authority thereby conferred upon him.

[78] The main question involved is as to the rights of the receiver, Gasche, to take the property in controversy away from the plaintiff's attachment. The weight of authority seems to be that a receiver cannot, as of right, sue in a foreign court, but is confined to the courts of the state of his appointment: Booth v. Clark, 17 How. 322; High on Receivers, 239. Yet his right to bring such suits ordinarily is now, as a general rule, recognized as arising from the application of the doctrine of interstate comity (Chandler v. Siddle, 3 Dill. 477; Fed. Cas. No. 2594); and the evident tendency, as a matter of general convenience, is to accord to them such rights of action in all the states of the Union as they have in the state or in the jurisdiction of their appointment, subject to the due protection of the rights of the citizens of such foreign states: High on Receivers, 241. As between the states of the Union, these rights are never denied, except where the claim of such receiver comes in conflict with the rights of resident creditors. To these the receiver's rights must yield, for the first duty of a state is to its own citizens: Hoyt v. Thompson, 5 N. Y. 320; Runk v. St. John, 29 Barb. 585. In the case of Humphreys v. Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76, it was held that "a receiver appointed by the court of another state for the benefit of creditors therein residing can only sue in this state as such receiver on the ground of comity, and such comity will not be so extended as to sustain a suit by him to replevy property of the debtor which was attached in this state by a creditor residing therein, though the property, when attached, was in the actual possession of the receiver, and brought by him from the state where he was appointed, in the course of business." In Willitts v. Waite, 25 N. Y. 584, it is said: "A quasi effect may be given to the law [of another state] as a matter of comity and interstate and national courtesy, when the rights of creditors or bona fide purchasers or the interests of the state do not interfere by allowing the foreign statutory or legal transferee to sue for it in the courts of the state in which the property is; but he is regarded in such case as representing the original owner, and to this extent effect is given in one state or county to the laws of another."

In this case the received must be regarded as representing [79] the Dresden Milling Company, and entitled to only such rights as

to the fund in controversy as such company, were it before the court. Ordinarily, the rule is, according to the weight of authority, that a debt due a partnership cannot be garnished at the suit of an individual creditor of one of the partners. In some states this rule does not prevail: Story on Partnership, sec. 264, p. 415, note 1; 2 Shinn on Attachment, sec. 519; Parsons on Partnership, 4th ed., 256. The reason for this rule is, that the copartners cannot be divested of their right and title in and to the fund while the accounts of the copartnership remain unsettled, or its debts unpaid, and because garnishment is a legal proceeding, and the equitable rights between the garnishee and the defendant cannot be adjusted therein. "A court of law has no right to adjust partnership affairs, or appropriate the fund of all for the payment of an individual debt. It is only after all the affairs of the firm have been settled that an individual share of a partner can be taken by process of garnishment, and applied to the payment of individual debt." If the affairs of the Dresden Milling Company were fully settled then the interest of Egbert in the fund was subject to garnishment. This fund was garnisheed as the property of Egbert. The Dresden Milling Company, of which he was a one-half partner, through the receiver, claims the fund as the property of the firm and not the individual property of Egbert. To prevent its garnishment, therefore, it devolves upon the receiver to show that the affairs of the firm are unsettled, and that this fund is needed for the settlement thereof, independent of any claim of Egbert thereto. The foreign receivership will not be permitted to be a mere cover by which Egbert prevents the seizure and application of his property to his individual indebtedness, and enable him to remove the same beyond the jurisdiction of the courts of this state. For the protection of resident citizens, the law requires the receiver to show, not only his receivership, but also the necessity for the removal of the fund; otherwise, such receiverships could be made the instrument of perpetrating manifold fraud. In this case, the receiver merely proves that he was appointed such receiver, and that all the property had been converted into money; that all the debts [80] were paid, except some matters of costs. He does not show the state of the partnership funds, nor that the partnership has not been fully closed up and settled, nor that the fund in controversy was in anywise needed for the settlement of the firm affairs, independent of the claim of the partner Egbert. Now, if there are sufficient funds of the firm, other than the fund in controversy, to meet all demands against the

firm, or if all such demands have already been discharged, then this fund is the individual property of Egbert, though held in the firm name, and is liable to garnishment and application to his individual debts; and, under such circumstances, the foreign receivership will not be permitted to prevent such application. Being a mere trustee for Egbert as to the fund, the same would be subject to the payment of Egbert's debts: Code, c. 71, sec. 16. And under chapter 84 of the Code, a trust fund cannot be removed from the state if the rights of any person may be impaired or prejudiced thereby. By close analogy, this provision of the law would be applicable to this case; for why should this receiver be permitted to remove this trust fund if the rights of the plaintiff would be impaired or prejudiced thereby? Before he is permitted to do so, should he not be required to show to the satisfaction of the court that such removal will in nowise prejudice or impair the rights of the plaintiff by making it evident that Egbert has no attachable interest therein? So far as the showing goes, it is the contrary. The court therefore erred in directing a verdict in favor of the receiver.

There is also a serious doubt as to whether the debt on which plaintiff's suit is founded is not, in fact, a just liability against the Dresden Milling Company, although ostensibly against the firm of Egbert & Co. Egbert & Co. were engaged in selling flour for the Dresden Milling Company, Egbert being a partner in both companies, and acting as salesman for both and the receiver. As shown by the record, on the 15th of May, 1892, the sale of flour which gave rise to the liability was made to plaintiff by Egbert & Co., as they claim, as purchasers from the Dresden Milling Company. The same day the partnership of Egbert & Co. was dissolved, and the next day, the Dresden Milling [81] Company, on application of Egbert, partner in both companies, was committed to a receiver, and the proceeds of such sale of flour went into the hands of a receiver. In other words, the Dresden Milling Company, through the partner Egbert, furnished the unmerchantable flour to the firm of Egbert & Co., which in turn, through its partner, the same Egbert, disposed of the same to plaintiff; and the proceeds were added to the assets of the Dresden Milling Company, one-half thereof, at least, being for the benefit of Egbert. Then both firms dropped out of existence—one without funds, and the other with all funds turned over to a receiver. A jury, from this state of facts, would be justified in holding that this sale, fraudulent as to the plaintiff, was a sale made by the Dresden Milling Company, ostensibly

in the name of Egbert & Co., and that the liability incurred was primarily one of the Dresden Milling Company, and that the funds in controversy were the funds of such company, and liable to garnishment, and that the receiver, standing in the shoes of the latter company, was not entitled to take such fund away from such company's creditors in this state, unless he would show that they were absolutely necessary, through want of other funds, to pay obligations of the receivership incurred by himself.

The court would not permit the plaintiff to prove, in defense of the receiver's claim, that the proceeds of the flour went to swell the assets of the Dresden Milling Company, nor to prove, by the record and otherwise, the character of the plaintiff's claim, as tending to show a primary liability against the Dresden Milling Company, and that the alleged firm of Egbert & Co. were merely agents in the transaction for the Dresden Milling Company, for the purpose of rebutting the right of the receiver to take the fund. In this the court also erred; for, as heretofore shown, a foreign receiver cannot assert title to property within this state as against the attachment of a resident creditor. He simply represents the debtor whose title is subject to attachment: Runk v. St. John, 29 Barb. 585. Not only this, but the evidence tended to show that the receivership was a mere cover to enable Egbert to handle and dispose of his own property in such manner as to [82] hinder, delay, and defraud his creditors in this state. The doctrine of interstate comity does not go to this extent; and such receivership would be deemed void as to creditors or purchasers for value, without notice.

For these errors, the judgment is reversed, the verdict of the jury set aside, and a new trial awarded.

RECEIVERS—FOREIGN—RIGHTS OF, AS AGAINST RESIDENT CREDITORS.—As between a foreign receiver, assignee, or trustee and a resident attaching creditor, the latter is protected by the courts of his state: Holbrook v. Ford, 153 Ill. 633; 46 Am. St. Rep. 917. See Humphrey v. Hopkins, 81 Cal. 551; 15 Am. St. Rep. 76, and extended note. State comity does not require the courts of one state to permit receivers appointed by the court of another state to exercise privileges detrimental to the citizens of the former while pursuing appropriate legal remedies there: Hunt v. Columbian Ins. Co., 55 Me. 290; 92 Am. Dec. 592; Peterson v. Chemical Bank, 32 N. Y. 21; 88 Am. Dec. 298. See, also, Catlin v. Wilcox etc. Plate Co., 123 Ind. 477; 18 Am. St. Rep. 338, and note.

PARSONS *v.* BALTIMORE BUILDING AND LOAN ASSOSOCIATION.

[44 WEST VIRGINIA, 335.]

DEEDS — PARTY-WALL AGREEMENT. — An agreement signed, sealed, and acknowledged, sufficient in form to constitute a deed, mutually securing a joint interest in a party-wall between adjacent landowners, is properly admitted to record as a deed, and constitutes notice to subsequent purchasers.

DEEDS—PARTY-WALLS—COVENANTS.—If one of the parties to a deed of a party-wall covenants that he or his grantee shall pay one-half of the expense of constructing such wall whenever he shall make use of it, and stipulates that such covenant shall run with the lot, a lien is thereby created thereon which is binding upon a subsequent purchaser, although he has not assumed the liability personally, and has no notice thereof, other than that the record of the deed affords.

PARTY-WALLS—ASSIGNMENT OF PROMISE TO PAY FOR.—If one of the parties to a deed to a party-wall covenants that he or his grantee will pay onehalf of the cost of construction whenever he makes use of such wall, such covenant is personal to the party constructing the wall, and his assignee may maintain suit to enforce the payment of such liability.

L. D. Isbell and J. B. Laidley, for the appellant.

Simms & Enslow and H. Fitzpatrick, for the appellees.

336 DENT, J. On the fifteenth day of March, 1893, John Hooe Russell and Elizabeth Shore and husband entered into the following mutual agreement, which they signed, sealed, acknowledged and had recorded, to wit:

"This deed, made this 15th day of March, 1893, between R. Shore and Elizabeth Shore, his wife, party of the first part, and J. H. Russell, party of the second part, witnesseth: That whereas, Elizabeth Shore is the owner of lot number twenty-one of block number 144 in the city of Huntington, Cabell county, West Virginia, situated on the north side of 3d avenue, and the second lot from the corner of 11th St., and commencing 40 feet from said 11th St., and the said Russell is the owner of the adjoining lot lying between her said lot and 11th St., and his lot is numbered 22 in block number 144, and the said E. Shore is about to erect a brick building on her said lot, and [it] is now agreed between the parties aforesaid that the said E. Shore should erect the west brick wall of her said building so that one-half 337 of the wall shall be on the said lot of the said Russell, and it shall be a party wall between the said Russell and the said E. Shore, and that whenever the said Russell, his as-

signs or grantees, use the said western wall of said building, he or his grantee or assignee shall use the said wall, and shall pay to the said E. Shore, or whomsoever he may assign to collect the same, half the actual cost of said west wall of said building; and this deed or covenant shall run with said lots. Given under our hands and seals, the day and year aforesaid.

"ELIZABETH SHORE. [Seal]
"R. SHORE. [Seal]
"JNO. HOOE RUSSELL. [Seal]

"State of West Virginia, Cabell County, to wit:

"I, H. C. Simms, a notary public in and for the county aforesaid, do certify that J. H. Russell, whose name is signed to the foregoing writing, bearing date on the 15th day of March, 1893, has this day acknowledged the same before me, in my said county.

"Given under my hand, this 15th day of March, 1893.

"H. C. SIMMS, N. P.

"State of West Virginia, County of Cabell—ss.

"I, Francis M. Hartman, a notary public in and for the county and state aforesaid, do certify that Elizabeth Shore and R. Shore, her husband, whose names are signed to the foregoing writing, bearing date on the 15th day of March, 1893, have this day acknowledged the same before me, in my said county.

"Given under my hand, this 31st day of March, 1893.

"F. M. HARTMAN,
"Notary Public.

"State of West Virginia,
"Cabell County Clerk's Office.

"The foregoing writing was this day presented in my said office, and duly admitted to record.

"Given under my hand, this 31st day of March, 1893.

"F. F. McCULLOUGH.
"Clerk C. C. C.

"(A copy from the record.)
"Teste:
"F. F. McCullough,
"Clerk C. C. C."

Without building on his lot, on the thirteenth day of October, 1894, Russell conveyed the same to Lulu M. Harris, by deed in which he stipulated "that the said Lulu M. Harris is to pay Mrs. Elizabeth Shore for the part of the wall of the Shore building which adjoins the said lot herein conveyed, agreed to be bought

by the said John Hooe Russell of the said Mrs. Elizabeth Shore, so as to relieve the said John Hooe Russell from any payment on account of said [338] wall"; and he further warranted "generally the title to the same free from all liens and encumbrances except for the said wall adjoining the said lot, and for the said paying assessments which the said purchasers are to pay." Lulu M. Harris immediately proceeded to build on the lot, and make use of the wall; and, for the purpose, she borrowed from the Baltimore Building & Loan Association the sum of fifteen thousand dollars, to secure which she conveyed the lot in trust to Thomas A. Wiatt, trustee. Failing to pay her dues, assessments, et cetera, to the association, it caused the trustee to sell the property and became the purchaser thereof. Mrs. Shore being still the owner of the adjoining lot, and having assigned her rights as to the one-half of the expense of building the wall to the present plaintiffs and Thomas Sikes, the defendant, the present suit was instituted to have the same declared a lien on the Russell lot, and, in default of payment thereof, to subject the lot to sale. The circuit court so decreed, and the association appeals, and presents the following three material questions to this court: 1. Was the agreement of the 15th of March, 1893, such a deed as comes within the provisions of our recording statutes? 2. Did it create a lien or charge on the Russell lot for one-half the expense of the erection of the party-wall? 3. Was such a lien transferable in equity?

1. The paper on its face purports to be a deed. It is signed, sealed, acknowledged, and placed on record by the parties. It mutually secures a joint interest in a party-wall, situated half on each of two adjoining lots, to the owners thereof. It is therefore a mutual exchange of an interest or easement in real estate. Code, chapter 71, section 5, provides that "any interest in or claim to real estate may be disposed of by deed or will." To make a good deed, a writing need not be in any particular form or words, so the intention thereof is clear, and it is signed, sealed, and delivered. Recordation under certain circumstances is a sufficient delivery: Code, c. 72, sec. 1. "The matter written must be legally and orderly set forth; that is, there must be words sufficient to specify the agreement and bind the parties, which sufficiency must be left to the courts of law to determine; for it is not absolutely necessary in law [339] to have all the formal parts that are usual drawn out in deeds, so as there be sufficient words to declare clearly and legally the parties' meaning": 1 Tucker's Commentaries, 227. In a deed "it is not even necessary to use

the technical operative words of any kinds of conveyance, although it is advisable to do so, in order to remove every doubt of the validity of the conveyance. Any words will be sufficient if they clearly manifest the intention to transfer the estate": 5 Am. & Eng. Ency. of Law, 438. The intention of the parties and the interest acquired and conveyed are plainly written on the face of this instrument, and therefore it must be regarded as a good deed for the purposes executed, and properly admitted to record. Not being an executory contract, it does not come under the provisions of section 4, chapter 74 of the Code, but is subject to section 5 of such chapter.

2. It is equally clear that the deferred payment of the purchase money for a one-half interest in the wall was intended to operate as a charge or mortgage on the Russell lot, and not as an individual liability of Russell, unless he should make use of the wall. The person who used the wall and therefore reaped the benefit thereof, was to be individually liable alone for the payment of the same, and to secure which the liability, as well as the benefits, was to run with and remain a charge on the lot. The language of the contract is, "that whenever the said Russell, his assigns or grantees, use the said western wall of said building, he or his grantee or assignee shall use the said wall, and shall pay to the said E. Shore, or whomsoever she may assign to collect the same, half the actual cost of said west wall of said building, and this deed or covenant shall run with said lots." It was plainly the intention of Russell only to create a personal liability on himself in case he used or got the benefit of the use of the wall, and that he did not intend personally to guarantee payment by his assignee or grantee in case the latter used the wall, but to bind the lot for the payment thereof, and thus relieve himself from personal liability, to which Mrs. Shore assented when she agreed to the provision that this deed, which included all of its covenants and payments made or to be made, "shall run with the said lots." To create an equitable mortgage or lien, it [340] matters not what language is used, so the intention is apparent: 13 Am. & Eng. Ency. of Law, 608. While it might be better, following the rule of this court in its opinions, to express the retention of a lien, or the grant of a charge or mortgage, in such plain and easy terms that even the unlearned in law and the weak of comprehension might understand, yet such is not an essential legal requirement.

The understanding that Russell had as to the effect of his deed is shown in his conveyance to Lulu M. Harris, wherein he

refuses to warrant the lot as against the encumbrance arising out of the party-wall agreement, and the fact that he adopted the additional precaution to provide against his personal liability cannot be deemed an admission of such liability if it did not already exist. It is also apparent from these stipulations that Russell did not get the benefit of the wall in the sale of the lot, but it was expressly excepted therefrom. Neither did Lulu M. Harris get the benefit thereof, for she lost the whole property in payment of the money she put in the building. But the association did get the benefit thereof in its trust lien which was put on the property before Lulu M. Harris became liable for the payment of the same by complete user thereof. And the association, having notice thereof, both from the agreement recorded and the provisions of the deed from Russell to Lulu M. Harris, under whom it derives title, should have seen that the party-wall was paid for, either out of the money loaned, or the rents and profits of the real estate accruing prior to its purchase. Russell, in his deed, could not personally bind his grantee, but he could bind the lot, and the grantee would take it subject thereto. It has been held by this court that the acceptance of a deed is an acceptance of all the conditions thereby imposed; and hence Lulu M. Harris might be regarded as individually bound, although she signed no writing to this effect: McClure v. Cook, 39 W. Va. 579. In the case cited, Judge Holt, on page 585, says: "It is true, a lien might have been in so many words reserved on the face of the conveyance on the land; but was that indispensable? A trust and charge like this are not within the letter of the statute, for it speaks only of purchase money." In this case, it is
341 not a question of purchase money, but it is as to whether the lot is liable for the improvement thereon, with the consent of the owner thereof. The association, deriving title from Lulu M. Harris, took it subject to like conditions, yet did not make itself personally liable therefor, so as to be subject to a suit at law or to a personal decree over in case a deficiency should remain after application of the proceeds arising from a sale of the lot. The personal undertaking of Lulu M. Harris was not transmitted to her grantee, and an action at law could not be maintained against such grantee: Cole v. Hughes, 54 N. Y. 444; 13 Am. Rep. 611; Scott v. McMillin, 76 N. Y. 141. The case of Mott v. Oppenheimer, 135 N. Y. 312, is exactly in point with the case under discussion, the language used in the party-wall contracts being almost identical. The court held that the contract created a charge or lien on the land as against a subsequent

grantee, who had not assumed the same personally, and had no notice thereof other than the record of the instrument afforded. The court says: "Where the covenant concerns land, and is one that is capable of being annexed to the estate, and it appears that it is the intention of the parties, as expressed in the instrument, then it shall be construed as running with and charging the land thereafter." Having once attached as a lien, he could not be released except by the person for whose benefit it existed. Neither Russell nor Mrs. Harris could release, but only Mrs. Shore or her assignee.

So far as Mrs. Shore was concerned, the payment of the money was personal to her or her assignee, and was not a covenant running with her lot: Hart v. Lyon, 90 N. Y. 663. Therefore the plaintiffs, as her assignees, had the right to maintain this suit. The trustee, Wiatt, having sold and conveyed the property, was not a necessary party to this suit. Lulu M. Harris was made a party, but was not served with process, nor did the defendants insist on her presence. As her rights have not in any manner been determined by the decree, she can still be brought before the court when the case is remanded, if the defendants so require.

The operative portion of the decree entered in this case is in these words: "It is therefore adjudged, ordered, and [342] decreed that the said sum of nine hundred and sixty-one dollars and eighty-nine cents, the cost of constructing said wall, with interest to this date, amounting to one hundred and fifteen dollars and twenty-nine cents, making a total of one thousand and seventy-seven dollars and eighteen cents, is the first lien and charge upon the said lot 22 of block No. 144, and it appearing there are no other liens upon the said property." This is not a personal decree against the association, nor does it subject the property to sale, but merely declares the debt a lien thereon. The decree is therefore affirmed to this extent, and the cause is remanded, with direction to the circuit court to subject the property to sale unless the debt, interest, and costs be paid, and to be further proceeded in according to the rules of equity.

PARTY-WALLS — COVENANTS AS TO — WHETHER RUN WITH THE LAND.—As to whether an assignee of a builder of a party-will can recover on a covenant for contribution, and whether an assignee of the covenantor is liable on the covenant, the decisions are in material conflict. Contracts with reference to party-walls should be construed with a view to carry out the purpose and intent of the parties, and, in a proper case, covenants contained therein will be held to run with the land: Kim v. Griffin, 67 Minn. 25; 64 Am. St. Rep. 385, and note. The majority of the authorities, however, maintain that these covenants do not run with the land, and that the grantees of the original parties cannot, by reason of their

holding adjoining lots, take advantage of the benefit, or be subjected to the burden of the covenant to pay for one-half of a party-wall, but that the right of recovery is personal to the builder, and the obligation to pay, except in certain cases, rests upon the covenantor only; and an agreement of the parties that the covenant shall be binding upon their heirs and assigns, or even that it shall run with the land, is ineffectual: See monographic note to Bloch v. Isham, 92 Am. Dec. 301. Contra, Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433, where the assignee had actual notice of the covenant; and Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283, where the party-wall covenant was inserted in a duly recorded deed, and was held binding upon purchasers thereunder.

WALKER *v.* BURGESS.

[44 WEST VIRGINIA, 399.]

LIMITATION OF ACTIONS—STATUTE CHANGING PERIOD.—A statute changing the period of limitation of actions applies only to prospective and not to antecedent transactions, unless the letter of the statute or its necessary and inevitable intent requires it.

LIMITATIONS OF ACTIONS—RIGHT OF ASSIGNEE OF NOTE TO PLEAD.—The assignee of a note may plead the statute of limitations against a setoff based upon a claim against his assignor.

Campbell, Holt & Campbell, for the appellants.

Marcum, Marcum & Shepherd, for the appellee.

400 BRANNON, P. The action was upon five promissory notes made by Burgess & Napier to P. S. Walker and by the latter transferred to plaintiff, A. Walker, and defendants pleaded setoffs, based on store accounts against P. S. Walker, and the plaintiff replied against the setoffs the statute of limitation of three years. Thus two questions arise: 1. Is three years the bar, under section 6, chapter 104 of the Code of 1891, which was in force when the setoffs accrued, and also when the action began, or five years under chapter 2 of the acts of 1895, amending said section, which act was in force when the plea of setoffs was filed? 2. Can the plaintiff plead the statute?

The first question we answer by saying that statutes are to be construed to be prospective in operation, and not to retroact, and govern antecedent transactions. I use the word "construed," meaning that courts do not, by mere construction, give statutes backward effect, but will do so if the letter of the statute or necessary and inevitable intent require it: Stewart v. Vandervort, 34 W. Va. 524. And though statutes of limitation do not destroy the right, but affect only the remedy, this court has applied the rule to such statutes: State v. Mines, 38 W. Va. 125, syllabus point 6; Maslin v. Hiett, 37 W. Va. 15, syllabus point 2; Fowler v. Lewis, 36 W. Va. 113; Casto v. Greer, 44 W. Va. 332. Noth-

ing in the new statute calls for retroactive construction; and the period of three years, being the bar at date of the sale of the store goods, applies, not the new law in force at the date of the plea.

As to the second question: It is true that generally the statute of limitations is a plea personal to the debtor, which [401] he may use or waive, as he pleases, and which one who is a stranger to him, standing in no relation of privity in estate with him, cannot use. But this court has held that, where there is a privity between the party who could, if sued, plead the statute, and the party offering to plead it, the latter may plead it to save his property. Such is the case with heirs, devisees, vendees, or mortgagees: McClaugherty v. Croft, 43 W. Va. 270. An assignee of a note is privy in estate to the assignor as much as the alienee or vendee in sales of land; and if a vendee of land is entitled to protect his estate against a claim against his vendor sought to be enforced against the land, so is such assignee. Often the one owing the setoff is not a party, so as to allow him to plead; and, if the assignee cannot plead it, his estate in the note is lost. And even when the one entitled to plead is a party, his nonaction or collusion will not be allowed to defeat his assignee's right any more than his receipt of payment, or declaration or other act after assignment will do so. The law gives the assignee right to use the name of the assignor, whether the latter is willing or not, in a suit to recover the debt, and so it ought to allow the assignee the use of any defense against a claim which would destroy the assignee's property in the note assigned. In Thompson v. Sickles, 46 Barb. 49, cited in Waterman on Setoff, section 98, held: "In such action, brought by an assignee of the note, the plaintiff may raise the objection that a setoff against his assignor [the payee], averred in the answer, is barred by the statute of limitations." The statute ends the case, barring all the setoffs, and leaving the notes to justify the judgment. The judge trying the case found upon the evidence properly as facts that the setoffs could not be treated as payments, even if applicable to the notes, four of them being negotiable, and that the plaintiff was bona fide holder for value. If treated as non-negotiable notes the same judgment would follow. It is useless to discuss other matters, as they would be inoperative on the judgment, and relate to matters well settled in law.

Affirmed.

LIMITATIONS OF ACTIONS—CHANGE IN STATUTE—CONSTRUCTION.—The legislature has power to pass limitation laws,

and to alter or change them by extending the time for their enforcement, or to shorten the time by giving a reasonable time for asserting the right, provided such laws do not affect cases to which the bar of the existing statute of limitations has attached: Lawrence v. Louisville, 96 Ky. 595; 49 Am. St. Rep. 309, and note. A statute must not be given a retroactive effect unless its language expressly requires it: Lane's Appeal, 57 Conn. 182; 14 Am. St. Rep. 94, and note; Lawrence v. Louisville, 96 Ky. 595; 49 Am. St. Rep. 309; State v. Switzler, 143 Mo. 287; 65 Am. St. Rep. 653.

MILLER *v.* ZEIGLER.

[41 WEST VIRGINIA, 484.]

ATTACHMENT — UNSIGNED WRIT — AMENDMENT.—A writ of attachment not signed by the clerk, is voidable only and not void, and admits of amendment.

ATTACHMENT—SIGNING WRIT—AMENDMENT.—A writ of attachment, not signed by the clerk when issued, but signed by him before a motion to quash, is good as against such motion.

PROCESS — AMENDMENTS.—Courts have inherent power over their process, and may allow clerical errors and omissions by inadvertence to be amended at any time outside of statutes enabling them to amend.

PROCESS—AMENDMENT OF ATTACHMENT.—The inherent power of a court to amend its process is the same in attachment as in other suits.

ATTACHMENT.—SUPPLEMENTAL AFFIDAVIT in attachment need not expressly state that the additional facts therein stated came to the affiant's knowledge since the first affidavit.

ATTACHMENT—EQUITY.—If an attachment in a suit in equity for a debt before maturity is bad, and fails, the suit must fall with it, and should be dismissed.

Simms & Enslow and H. Fitzpatrick, for the appellants.

Campbell, Holt & Campbell, Brown, Jackson & Knight, and R. G. Quarrier, for the appellee.

485 BRANNON, P. Jacob Miller, Sons & Co. instituted this suit in equity, with attachment, against Jacob Zeigler; and the attachment having been quashed and the suit dismissed, the plaintiffs appeal.

The defect in the attachment is, that it was not signed by the clerk. There is conflicting evidence as to this; but let us say that when issued and placed in the sheriff's hands and when levied, it was not signed, but was later signed by the clerk, and was so when the motion to quash was made. Is an attachment void for want of a clerk's signature? Or does it render it merely voidable? The distinction is important, since, if only voidable, it may admit of amendment. I know that some cases hold that this defect makes the writ incurably void: Wade on Attach-

ment, sec. [486] 121; 1 Shinn on Attachment, 361. These authors do not so lay it down as law, nor does that excellent work, 3 American and English Encyclopedia of Law, second edition, page 208. They do show that it is essential, and that such defect renders the attachment irregular, but not void, in the sense of absolute nullity. A leading case cited for the proposition is Wiley v. Bennett, 9 Baxt. 581; but the constitution demanded the signature of the clerk, and this requirement, being in the constitution, was in the highest sense mandatory, and vitiated the writ, as did the failure to make a writ run in the name of the state, in Gorman v. Steed, 1 W. Va. 1. But, upon a review of the books, I conclude that the defect, though it makes the order of attachment quashable on motion, does not make it void beyond cure. Ambler v. Leach, 15 W. Va. 677, held that a summons commencing an action, not signed by the clerk, did not render it void, in the sense of null, but voidable on motion; and in Laidley v. Bright, 17 W. Va. 790, Judge Green says such is the great weight of authority. This derives strong support in Hogue v. Corbit, 156 Ill. 540; 47 Am. St. Rep. 232. I think so, and think too that it is the sensible view, overruling a mere technicality arising from inadvertence of public officers, which ought not to prejudice the public. I hold that when the motion to quash was made, had the signature then been absent, the court ought to have given leave to amend. Courts have inherent power over their process, and may allow clerical errors and slips of inadvertence to be amended, outside of statutes enabling them to amend: Barber v. Swan, 61 Am. Dec. 127; Anderson v. Kanawha Coal Co., 12 W. Va. 526. We are told that Laidley v. Bright, 17 W. Va. 790, holds that a clerk ought not to be allowed to amend a summons. That was after judgment on a proceeding to reverse, as if such motion were made in this court; but this amendment was asked while the proceedings were in fieri—a great difference. Courts have held that the omission of seal to an attachment does not invalidate a judgment, as it does not render the writ void: Wehrman v. Conklin, 155 U. S. 314. In the lucid opinion in Wolf v. Cook, 40 Fed. Rep. 435, it is asserted that an attachment may clearly be amended by allowing the clerk to sign, just as amendment may be made by allowing a seal to be affixed, and many cases are [487] cited as to seals. So as to signature in Huntley v. Henry, 37 Vt. 167. Frequently have courts allowed amendments to attachment writs: Wade on Attachment, sec. 123; Bank of Missouri v. Matson, 72 Am. Dec. 208; full note, Barber v. Swan, 61 Am. Dec. 127. All voidable process can be made perfect by amendment, but void cannot be: Dur-

ham v. Heaton, 81 Am. Dec. 275; Parker v. Barker, 80 Am. Dec. 130. "As a general rule, there must be something by which to amend the process. With this limitation, nearly all defects can be amended": 1 Am. & Eng. Ency. of Law, 552. I know it has been said that statutes of amendments do not apply to attachments, and that they are governed by the most strict law. So they ought to be, as regards compliance with the law defining grounds of attachment; but why mere clerical errors of officers in issuing the order, with which the suitor has nothing to do—why the act of the law, which ought to give the suitor a good writ—ought not to be made good by amendment, as in other cases, I cannot see. Why technicality should override justice, in even attachment cases, I cannot understand. And herein I find support in the United States supreme court, in Tilton v. Cofield, 93 U. S. 163, holding that, "where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others." So in Anderson v. Kanawha Coal Co., 12 W. Va. 526, and Farmers' Bank v. Gettinger, 4 W. Va. 305. It seems that, after the issuance of the attachment, the clerk's deputy signed it. He only did what at the first he ought to have done, and what, if he had not done it, the court ought to have allowed him to do. But there is another reason operating strongly with me to sustain the attachment, as regards this point. The plaintiffs' attorney designated in a written memorandum on the same paper, below the order, a bank as indebted to Zeigler, and asked that it be summoned as garnishee; and just below, on the same paper, the clerk signed an order requiring the bank to appear and answer. It is not disputed that this order was properly signed. It is to be read as an annex to the order of attachment. It is senseless and unmeaning unless read with it, as the law allows. That is a recognition by the clerk of the authenticity of the order of attachment. The only object of the signature of the clerk is to show by [488] what authority the process issued, and its genuineness; and that is done by this garnishee order. State v. Downing, 48 La. Ann. 1420, supports this view. After completing this opinion, I find the case of Farmers' Bank v. Gettinger, 4 W. Va. 305, holding that failure of a clerk to sign a jurat to an affidavit to an attachment will not vitiate a judgment. This strongly sustains our present decision. What more important than record evidence that the affidavit of cause of attachment was sworn to? I find also Anderson v. Kanawha Coal Co., 12 W. Va. 527, holding, as I said above, that all courts have, without statute authority, power to allow officers to correct at any time clerical errors, and allowing a correction of a date

in affidavit, and an omission to indorse on an attachment bond its approval.

I think the facts stated are sufficient, prima facie, to sustain the grounds of attachment. I need not detail or discuss them, as, like evidence, they vary in each case, and would be no precedent in other cases, and the requirements of the law with regard to the material facts to sustain grounds of attachment have been sufficiently stated in prior cases: Goodman v. Henry, 42 W. Va. 526, and citations; Capehart v. Dowery, 10 W. Va. 130.

The point is made that the supplemental affidavit filed does not positively state that the new facts it gives came to the knowledge of affiant after he made the first affidavit. This is not necessary, because we must assume that new facts became known afterward, as self-interest would have dictated their statement in the first affidavit. Shall we overthrow an act done under a remedial statute of amendment on such ground? Besides, I think it not necessary to so state, and that facts known to the affiant at the making of the first affidavit, and forgotten by him, or inadvertently omitted, and which he could not say had since come to his knowledge, may be introduced by the second affidavit, and even facts which he then did not deem it necessary to state, because I think this is a statute mitigating the rigor of the law denying amendments to the substance of an affidavit as to grounds of attachment, as it concerns the very life of the proceeding. This court has said this statute must be liberally construed, and liberally [489] applied, as a statute of amendment: Goodman v. Henry, 42 W. Va. 526. The words of the code on which this contention is based are not descriptive of the contents of the affidavit, but of the facts to go into it, like the words "to the prejudice of another's right," in the forgery act, which are descriptive of the writing, not the act: Powell v. Commonwealth, 11 Gratt. 822.

The point is made that the bill ought not to have been dismissed. The demand was not mature, and attachment without a statute cannot be had until maturity of the demand: McCluny v. Jockson, 6 Gratt. 96; 3 Am. & Eng. Ency. of Law, 2d ed., 1941; Drake on Attachment, sec. 28. But section 1, chapter 106, of the Code of 1891, allows an attachment in equity for a debt before maturity. If the attachment was bad, and quashed, the bill would fail with it: Wade on Attachment, sec. 161. I have no doubt that a creditor may assail a fraudulent transfer before maturity of his debt. But the bill, while setting up a fraudulent transfer, does so only as evidence to sustain the attachment, and does not go for the property transferred. Hence the bill

could not be sustained independently of the attachment, on that ground. But as the attachment is good, this becomes immaterial. These views lead us to a reversal of the decree, and the overruling of the motion to quash the attachment and affidavits, and the overruling of the demurrer to the original and amended bills, and we remand the cause.

Reversed.

PROCESS—AMENDMENT—ATTACHMENT.—All voidable process can be made perfect by proper amendment, but void process cannot be: Note to Sharman v. Huot, 63 Am. St. Rep. 649. Many clerical defects in writs of attachment have been held to be capable of being remedied by amendment; and in the absence of statutes expressly authorizing defects in form to be corrected, the courts would seem to have the power to make the amendments under the general control which they have over their process: See monographic note to Barber v. Swan, 61 Am. Dec. 127. See Brown v. Neale, 3 Allen, 74; 80 Am. Dec. 53.

ATTACHMENT—AFFIDAVIT—AMENDMENT.—An affidavit for an attachment may be amended upon motion, and it is not error to permit it: Maples v. Tunis, 11 Humph. 108; 53 Am. Dec. 779; monographic note to Barber v. Swan, 61 Am. Dec. 129, 130.

BERRY *v.* WEST VIRGINIA AND PITTSBURGH RAILROAD COMPANY.

[44 WEST VIRGINIA, 538.]

CARRIERS—LIABILITY AS SUCH, WHEN ENDS.—A carrier continues liable as such for a reasonable time after the goods have arrived and have been put in the warehouse. After such time the liability is only as a warehouseman.

CARRIERS.—WHAT IS REASONABLE TIME FOR REMOVAL OF GOODS by the consignee from a railroad warehouse after their arrival is a question of fact, under all the circumstances, for the jury to decide, unless such facts are accurate and undisputed, and then it is a question of law for the court.

CARRIERS—DUTY OF CONSIGNEE TO REMOVE GOODS. The consignee must keep a lookout for the arrival of his goods by adopting such means as may be expected to inform him of their arrival, and to hold the carrier liable as such, after their arrival, he must promptly and diligently remove them within a reasonable time, regardless of his distance from the depot or his means for removal.

CARRIERS—DUTY TO GIVE NOTICE OF ARRIVAL OF GOODS.—A carrier is not required, in the absence of usage, to give the consignee notice of the arrival of his goods, and the latter is only entitled to a reasonable time after such arrival to remove them. During such time the carrier is liable as carrier, and after that only as a warehouseman.

CARRIERS—NOTICE OF ARRIVAL OF GOODS—AGENCY. Notice of the arrival of goods given to a drayman merely authorized to haul such goods from the depot to the store of the consignee is not notice to the latter.

CARRIERS—EXEMPTION FROM LIABILITY FOR NEGLIGENCE.—Special provisions in a contract made by a carrier cannot excuse or exempt him from liability for negligence.

CARRIERS—RIGHT TO LIMIT LIABILITY.—Contracts of carriers, based upon a valuable consideration, limiting their common-law liability, are valid, but cannot exempt from liability for negligence.

CARRIER—NOTICE OF ARRIVAL OF GOODS.—MISINFORMATION given by a carrier or its agents to the consignee as to the arrival of goods, and which prevents their removal, binds the carrier, and makes him liable for the value of the goods if they are thereafter lost or destroyed.

J. Brannon, for the appellant.

W. E. R. Byrne and H. B. Black, for the appellees.

539 BRANNON, P. In an action before a justice in Braxton county, Berry & Son recovered a judgment against the West Virginia & Pittsburg Railroad Company, and on appeal the case was tried by a jury, and the plaintiffs recovered a judgment against the company, which has been brought here by writ of error. The action was to recover damages for the destruction of a roll of carpet in the burning of the company's warehouse at Sutton. As the fire is not to be attributed to the negligence of the company, the question at once arises whether the company is to be judged by the law of common carriers or not, for the law makes a common carrier an insurer of the goods against everything except the act of God, the public enemy, or the conduct of the owner, or from the nature and character of the property: McGraw v. Baltimore etc. R. R. Co., 18 W. Va. 361; 41 Am. Rep. 696; whereas a warehouseman, who is a mere bailee, can be made liable 540 only by proof of his negligence. The question, then, is one which, so far as I know, has never been decided in either of the Virginias, but which has been the subject of elaborate, able, and refined discussions in the great courts of the country, and upon it those courts have widely differed. So close is the question, so well defended has been each side, that it is very difficult to decide which is the more logical view. The question is this: When a railroad company has transported goods from the point of shipment to the point of delivery, and has unloaded them from its cars, and deposited them in its warehouse, is it still, while the goods are in the warehouse, bound by the law applicable to common carriers as it was during the transit, or did its liability under that law cease the moment the goods reached destination, and were removed from the car? I hold that, after the removal from the car, for a reasonable time, the company yet remains bound by the law of common carrier, and after the expiration of such reasonable time it ceases to be bound by that law of bailment. I hold that the court should construe the contract to be one by

which the carrier, under the law of carriers, undertakes to carry goods from the point of shipment to the point of destination, and deliver them to the consignee within a reasonable time after arrival, and to preserve them after arrival during that reasonable time in a warehouse after unloading them from the cars, and so preserve them still under the same law of common carrier. So the parties really meant and understood the contract. They did not mean—certainly the shipper did not mean—that between shipment and delivery the relation of the parties should be changed by converting the carrier into a warehouseman. The common sense of the contract makes it one contract under one rule of law, and does not split it into two contracts governed by different principles of law. And with me public policy operates very strongly in solving the vexed question. That policy, for high public purposes of safety to the owners of property passing over the railroads and other means of transportation, exacts the most rigid liability of common carriers, makes them insurers, and courts should be very slow, when they know the necessity of the enforcement of this public policy [541] to render decisions abating from the liability imposed upon common carriers by the law. In our days, more than ever before, railroads and other common carriers have become almost a part of the government, as they perform such vastly important functions in the business of organized society; and, while the courts should do them justice, they should not release them from legal liability upon mere abstract refinements. It is a refinement to say that this company was under the liability of common carrier from Philadelphia to Sutton, but that when it moved this bale of carpet from its cars upon its platform that liability instantly ceased, and it became subject to a lessened degree of legal responsibility. It seems technical and unjust to the shipper unless that shipper delays to call for his goods beyond a reasonable time, and thus becomes, in the eye of the law, himself negligent.

The argument has been made that the shipper should be at the station to receive his goods instantly on arrival, and that the warehouse is made for his benefit to preserve his goods, and not for the benefit of the railroad company, and therefore the shipper should excuse the carrier from the rigid liability of carriers so soon as the goods leave the car doors. But this argument is surely not tenable. The company cannot keep goods in cars, because the cars are needed elsewhere for its business. It cannot conveniently separate and deliver numerous articles piled in the cars as they are called for. It cannot obstruct its tracks with standing cars. Goods must sometimes be kept for weeks before

delivery, and other goods must be detained for payment of freight. The warehouse is indispensable to the company for its own necessary purposes, and in no just sense is it maintained for the sole benefit of shippers, so as to enter as an element against them in the question whether as to goods stored in it the carrier is yet a carrier or a warehouseman. Nor can it be the duty of the shipper to be at the depot on arrival of his goods. There is no certainty as to the time of arrival, and this, not from the shipper's fault, but from the fault, if any fault there be, of the company. No schedule of freight trains will afford the shipper any certain guide, as they are so irregular. In long transits, and over connecting lines, the shipper [542] cannot even guess as to time of arrival. To require him to be at the depot, or suffer for failure to be there, would charge to him the fault of the company in delays. I say that we can draw no logical difference between the warehouse and the car as to the character of the liability of the company. They are both necessary instruments in the performance of the function of transportation and delivery, both of which are duties assumed by the company. I think that the discussion of this subject in the latest and very valuable work on Railroads by Elliott, volume 4, section 1527, is a clear, strong presentation of the subject. He takes the view in result above expressed. Such is the great weight of authority. It is clearly and succinctly stated, also, in 5 American and English Encyclopedia of Law, 263: See Hutchinson on Carriers, sec. 367. Thus I conclude that the defendant cannot be relieved from liability on the theory that its liability as common carrier had ceased.

I have stated above that the carrier continues liable as such for a reasonable time after the arrival of the goods. The question what is a reasonable time cannot be definitely fixed by hours. Hutchinson on Carriers, section 377, says that the reasonable time in which to remove the goods will be such as would enable the consignee, if living in the vicinity of the place of delivery, to remove them in the ordinary course and in the usual hours of business, and that this time will not be varied to suit the distance at which the shipper may reside, nor his convenience or means of removal, but he must remove the goods with diligence after he is informed of their arrival, and must provide ample means to do so. This is the case even under the rule that the carrier's liability does not cease until a reasonable time after the arrival of the goods. The duty of the consignee to take the goods away is as imperative as the duty of the carrier to deliver them. He cannot, at his option, continue the stringent liability

of the carrier, but must act promptly, and, if he does not, the liability of the carrier as an insurer ends. Of course, I am not to be understood as saying that, after such reasonable time, no liability whatever rests on the railroad company. I mean only that its liability as carrier ends, and that it then becomes liable only as bailee: Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170; 6 Am. St. Rep. 350. [543] See 5 Am. & Eng. Ency. of Law, 270. What is a reasonable time is largely a question of fact, dependent upon the circumstances, to be decided by the jury. If the facts are accurate or undisputed, it is a question of law; otherwise it is a jury question: 5 Am. & Eng. Ency of Law, 270.

Is it a duty of the railroad company to give notice of the arrival of goods? Some authorities say that it is as to persons living in the vicinity of the depot; but the better authorities, and the reason of the matter, declare that it is not incumbent upon the railroad to give such notice. Why? While the consignee need not be at the depot to take his goods at the moment of arrival, and the law retains the railroad company under the liability as carrier for a reasonable time, yet it does not indefinitely hold it under this high degree of liability, but requires the consignee to keep a lookout for the arrival of his goods by adopting such means as may be expected to inform him of their arrival. No notice from the company is necessary: Illinois Cent. R. R. Co. v. Carter, 165 Ill. 570; 4 Elliott on Railroads, sec. 1527; Rorer on Railroads, 1289; 2 Redfield on Railroads, sec. 175, point 4. Baltimore etc. R. R. Co. v. Morehead, 5 W. Va. 293, seems to hold that notice is necessary, but it seems against the better authorities, and based on exceptional circumstances on account of inability to deliver at the point of destination. I remark that the provisions of the code, page 550, refer not to notice of arrival of goods, but that notice which is requisite to enable a railroad company, after the lapse of twenty-four hours from the arrival of the goods, to charge storage therefor. The consignee is not entitled to a reasonable time to obtain knowledge of arrival of the goods, and then another reasonable time to remove the goods. If we hold that the carrier is under obligation to give notice, then the consignee would have a reasonable time after notice to remove the goods; but if we hold, in the absence of usage, that it is not necessary that the railroad should give notice of arrival, it follows that the consignee has a reasonable time after arrival in which to remove the goods. The goods arrived about 5 o'clock P. M. on the 9th of April, and were burned on the 10th. The jury found that a reasonable time had not elapsed after arrival in which the goods should have been taken away

in this instance, so far as its [544] verdict is based upon that question, and I cannot say that the time was beyond a reasonable time. In my view, if that time was a reasonable time, it is not material when within that time the plaintiffs knew of the arrival of the goods, because the entire time is not longer than a reasonable time. We would infer from some books that the consignee has a reasonable time after notice, but I hold that the reasonable time commences from arrival. Where the party is present on the arirval, or gets early notice of arrival, that fact enters as an important element in the decision of what is a reasonable time for removal, as, having notice, he should proceed promptly to consummate the removal; but he has a reasonable time, notice or no notice, after arrival of the goods to effect their removal.

There is controversy in this case as to notice to the plaintiff of the arrival of the goods, and that involves a question of some importance. A drayman, who was in the habit of hauling goods for the plaintiffs, who were merchants doing business at Sutton, knew distinctly of the arrival of this carpet on the evening of the 9th of April, but, as it was raining, declined to take it; and the question comes up whether notice to him is notice to the plaintiffs. I hold that it is not. It would be going very far to say that a drayman, who was authorized merely to haul goods from the depot to the store, is an agent vested with the authority to receive notice to affect his employer, and change that employer's relation to the carrier as to the extent of the carrier's responsibility. Never did the merchant intend to constitute him an agent for such serious purpose. "The authority, if it existed at all, must find its source in the intention of the principal, whether expressed or implied. If that intention cannot be shown, the authority cannot exist": Mechem on Agency, 177. Such an agency is not to be so lightly created. Under the finding of the jury there can be no other notice considered than that received by the plaintiff's about 5 o'clock of April 10th—only an hour before the closing of the warehouse—and that did not convict the plaintiffs of any want of reasonable diligence in removing the goods.

The defendant claims exemption by reason of a clause found in the bill of lading providing that the company should not be liable for any loss or damage to the carpet [545] by fire and other specified causes beyond its control. It is claimed that this can have no effect contrary to the law. Such special provisions cannot excuse a common carrier from negligence. No stipulation can excuse it from liability for negligence, because it would relax the diligence and obligations of common carriers to the injury of the

public, and would be against public policy: 5 Am. & Eng. Ency. of Law, 288. This court has not denied the validity of the contracts of common carriers limiting their liability, but it has held that they cannot exempt from negligence of the carrier: Zouch v. Chesapeake etc. Ry. Co., 36 W. Va. 524; Brown v. Adams Exp. Co., 15 W. Va. 812; Maslin v. Baltimore etc. R. R. Co., 14 W. Va. 180; 35 Am. Rep. 748. But those cases explicitly state that there must be a valuable consideration for such special contracts, and such I understand to be the general law: 5 Am. & Eng. Ency. of Law, 298. It does not appear that there was any consideration for the exemption here claimed, by way of reduced freight or otherwise, so as to make said contract work any result in this case.

But there is one fact in this case which must decide it against the railroad company, regardless of when its liability as carrier ceased, and regardless of notice or diligence on the part of the plaintiffs, for a drayman called for this carpet on the evening before its destruction by fire, and was told by an assistant agent at the warehouse that the carpet had not arrived. But for this fact, it would have been removed and saved. The law seems to be very well settled that misinformation given by the railroad company or its agents to the consignee as to the arrival of the goods will bind the company, even though we regard it as only resting under the liability of warehousemen, when such information prevents the removal of the goods: 4 Elliott on Railroads, sec. 1463; 5 Am. & Eng. Ency. of Law, 275; 2 Redfield on Railroads, sec. 175, point 10; Jeffersonville R. R. Co. v. Cotton, 95 Am. Dec. 656.

There is no sign of a plea in this case, and we might raise the question whether the defendant is entitled to have the points made by him considered, as we might say that it is a mere inquiry of damages by a jury in the absence of a plea. These facts lead us to the affirmance of the judgment.

Affirmed.

CARRIERS—WHEN BECOME WAREHOUSEMEN—REASONABLE TIME FOR CONSIGNEE TO REMOVE GOODS.—Until a carrier's liability as carrier is terminated by its performance of all duties as such, its rights as warehouseman cannot begin: Grand Rapids etc. R. R. Co. v. Diether, 10 Ind. App. 206; 53 Am. St. Rep. 385. If the owner of goods shipped over a railroad permits them to remain at the depot of their destination for an unreasonable time, the liability of the railroad company as carrier is thereby terminated, and it becomes liable only as a warehouseman: Note to Grand Rapids etc. R. R. Co. v. Diether, 53 Am. St. Rep. 390. The consignee must have had a reasonable opportunity to remove the goods after notice to do so, or after a reasonable effort on the part of the

carrier to give such notice: Railway Co. v. Nevill, 60 Ark. 375; 46 Am. St. Rep. 208; McMillan v. Michigan Southern etc. R. R. Co., 16 Mich. 79; 93 Am. Dec. 208; Shenk v. Philadelphia Steam P. Co., 60 Pa. St. 109; 100 Am. Dec. 541. A carrier's liability as such is not terminated by the fact that goods have not been called for, for two or three weeks after their arrival, if the consignee has not had notice of such arrival, such notice having, in fact, been given to a person who fraudulently personated the consignee: Cavallaro v. Texas etc. Ry. Co., 110 Cal. 348; 52 Am. St. Rep. 94, and note. It is the duty of the consignee or owner to take notice of the course of business at the station of delivery, and to be ready to receive the goods when, in the reasonable course of business, they may be expected to arrive, or within a reasonable time thereafter: Blumenthal v. Brainerd, 38 Vt. 402; 91 Am. Dec. 349; Morris etc. R. R. Co. v. Ayres, 5 Dutch. 393; 80 Am. Dec. 215.

CARRIERS—STIPULATIONS LIMITING LIABILITY.—A common carrier cannot stipulate for exemption from liability for his own negligence: Bird v. Railroads, 99 Tenn. 719; 63 Am. St. Rep. 856, and note; though he may exclude his common-law liability as an insurer: Morgantown Mfg. Co. v. Ohio etc. Ry. Co., 121 N. C. 514; 61 Am. St. Rep. 679, and note; and may reasonably restrict his common-law liability: Dixie Cigar Co. v. Southern Exp. Co., 120 N. C. 348; 58 Am. St. Rep. 795, and note.

DELAPLAIN *v.* GRUBB.

[44 WEST VIRGINIA, 612.]

DEEDS—PRESUMPTION AS TO GRANTOR'S COMPETENCY.—It is presumed that the grantor in a deed was sane and competent at the time he executed it.

DEEDS.—OLD AGE ALONE does not affect the competency of the grantor in a deed.

DEEDS—GRANTOR'S CAPACITY—EVIDENCE.—The time of the execution of a deed is the material or critical point to be considered upon the inquiry as to the grantor's capacity, and the evidence of the officer taking the acknowledgment, and of disinterested persons present at that time, is entitled to peculiar consideration on the question of capacity.

DEEDS—GRANTOR'S CAPACITY—OLD AGE.—Although a grantor in a deed is extremely aged, his mind weak and impaired, compared with what it has been, his demeanor on occasions eccentric, and even if he has no capacity to transact general business, yet, if he understands the nature of what he is doing, and recollects the property he is disposing of, and the person to whom he is giving it, and how he desires to dispose of it, at the time that he executes the deed, this is sufficient to make it valid.

DEEDS—UNDUE INFLUENCE.—A grant of property, induced by gratitude for kindness, affection, and esteem, is not the result of undue influence.

DEEDS.—UNDUE INFLUENCE to avoid a deed must be such as to destroy free agency, and substitute the will of another for that of the person nominally acting.

DEEDS—UNDUE INFLUENCE.—To set aside a deed for undue influence it must be shown that the grantor had no free will, but stood in vinculis at the time he executed it.

DEEDS—UNDUE INFLUENCE.—Suggestion and advice addressed to the judgment never constitute undue influence in the

execution of a deed, and neither does solicitation, unless the grantor is worn out with importunities, so that his will gives way. Even earnest entreaty, importunity, and persuasion may be employed, as well as appeals to remember past kindness, or to relieve distress, without constituting it undue influence.

DEEDS—DELIVERY.—If the parties to a deed meet to make it and read, sign, and acknowledge it, without reservation and with intent that it shall then become effective, this amounts to delivery.

DEEDS.—DELIVERY of a deed depends on the intent of the parties, and if, without formal words of delivery, the intent may be shown by circumstances. Acknowledgment with direction to record the deed is strong evidence of delivery.

Hubbard & Hubbard, for the appellants.

Caldwell & Russell, for the appellees.

[613] BRANNON, P. By a deed of November 13, 1892, L. S. Delaplain conveyed [614] to his wife a house and lot and furniture, valued at sixteen thousand dollars, in the city of Wheeling, and, by check, gave her six thousand dollars in bank. Delaplain died the 27th of November, 1893, leaving a daughter and children of a deceased son. He was worth some three hundred thousand dollars to three hundred and fifty thousand dollars, mostly personalty. Mrs. Delaplain later willed said real estate to her daughter Elizabeth Grubb. This was followed by a suit by the children of the deceased son to set aside the said deed, but the circuit court refused to do so and the plaintiffs appealed.

Delaplain was seventy-eight years of age at his death. He had for many years been the chief member of a large wholesale dry-goods firm in Wheeling, and by his fine sense, industry, and frugality amassed a fortune. Senile dementia is the ground on which we are asked to nullify the said transfers. Until a few weeks before his death this man was strong and vigorous, physically and mentally. At the outset, I state that old age will not, alone, affect his act, and that the presumption of law is that he was sane, and competent to make such transfers: Buckey v. Buckey, 38 W. Va. 168. We must find something else than old age to cancel this deed. What is the basis on which that relief is asked? On several occasions he shed tears, saying that the little children would be left in poverty, supposedly referring to the children of Mrs. Grubb. He told his wife that the sheriff would come in, and sell them out of house and home. He expressed great apprehension of losing all his property, and at one time said that he had lost it all. He supposed everything was gone, and often talked about the little children being left in poverty. At the same time he was of large estate, and individu-

ally out of debt. This is regarded, I may say, as the chief weapon with which to overthrow the deed.

This peculiarity is capable of explanation short of his incompetency. On the 6th of August, 1893, the disastrous business panic which appalled the hearts of the stoutest business men was at its climax. Like a clap of thunder from a clear sky on that day came the failure of the Exchange Bank of Wheeling, producing wide business consternation there. Mr. Delaplain was its president. [615] He deeply felt the sting of this failure, and was very greatly depressed by it. He expressed great sympathy for the poor depositors, saying that he did not care for his own losses so much as for theirs. The effect of this bank trouble was that of deep depression upon him. He drank heavily from that up until three or four weeks of his death. His apprehension of financial ruin is a thing that might infest the mind of many persons—especially aged persons. There was his large investment in a wholesale business house, and the panic paralyzed business. This house owed thirty thousand dollars. A young member of the firm went to New York to procure money, but reported that he could get none for any security. He expected to lose from the bank's failure. He had large investments in banks, manufacturing stocks, and in a ranch in Texas. Property in stocks, especially, was withering under the force of the depression of panic, and no man could well say what would be the ultimate outcome. The stoutest, strongest men quaked and trembled in that disastrous crisis. Why should not this old man fear the wolf at the door? It is very common, we know, from human nature, for men in age, who have been the stay and support of a family, to have excessive fear about those near and dear to them, after they shall have passed away. So that I do not see a controlling force in the circumstance which is spoken of. On one occasion Mr. Delaplain got out of his bay window, three and one-half feet from the ground, into the adjoining lot of the Presbyterian church, with only his underwear on; but he seemingly recalled himself, and returned to his house. He was likely then thirsting for drink. The front door was kept locked so that he could not go out into the city to get drink, and likely this incident happened from that cause. On another occasion he came down into the hall, wearing only his underclothes, while the Reverend Dr. Swope was sitting there; but, seeing him, Mr. Delaplain was embarrassed, and returned upstairs. This is unimportant. On the day before his death he walked into Mrs. Delaplain's room, where a lady was present, without his outer-

clothing on, and asked if that was Chapline street. On one occasion he talked to Dr. Wilson, his attending physician, several minutes, and then seemed to [616] lose sight of who the doctor was, and said, "Why, that is you, Dr. Wilson, isn't it?" On another occasion his daughter in law sat down beside him in a car for some time without his recognizing her, but she did not at first recognize him, though much younger; and, when she said that she recently had a letter from her son, he asked her if it was not very hot where he was—he being absent as a consul at Demarara. A very natural question. He recalled his grandson's whereabouts. This substantially covers the strange and eccentric conduct of Delaplain, given to support the bill. Strange conduct, to a certain extent, it was; but many cases show, as stated in Buckey v. Buckey, 38 W. Va. 168, that it will not invalidate a deed or will.

Old men, especially when troubled, are very forgetful, very absent-minded; but that does not show that when they come down to the actual act of making a transfer, and have that subject specially and definitely upon the mind, that they are incapable of that act. Judge Carr said in Burton v. Scott, 3 Rand. 406: "Many witnesses relate trifling and wild conversations held by the testator, and sometimes actions and conduct which certainly showed a want of sanity for the time being, such as running away and staying out all night, chasing his servants, and throwing his cane at them, shutting himself up in his room for fear his family would kill him, et cetera. But these, when contrasted with the others, may, I think be fairly accounted for on the score of intoxication." That eccentric action was stronger than any eccentricity of Delaplain in this case, and yet it was held not to affect a will, when it was correlated to the evidence of sanity. So I say in this case that those incidents can by no means offset the strong evidence of capacity of Delaplain, and the presumption of law that he was sane. Now let us turn to the opinion evidence. Dr. Wilson, the attending physician, expressed the opinion that Mr. Delaplain was incompetent to transact business, and his evidence is certainly not without weight from his professional relations with Mr. Delaplain, and his capacity to judge of his sanity; but we must not let that evidence countervail the strong volume to the contrary. We must be very cautious how we overthrow the solemn deed of this man, [617] who during a long life had evinced so much intelligence and force of character as a leading, successful business man. The Reverend Dr. Swope, a witness for the plaintiff, while relating the incidents above

spoken of, sustains the competency of Delaplain, from the fact that, when asked for his judgment as to Delaplain's ability to attend to important matters of business, he responded that he could not say. When asked whether, in his judgment, he was of sound mind, or not, he responded that, in the conversations he had had with Delaplain, the latter always talked intelligently enough. While speaking of a change in Delaplain after the bank failure, he said that Delaplain evinced more dullness than before. When asked whether he ever found Delaplain unable to apprehend what he said to him, he answered, "No," and said that he never answered him in any other way than in an intelligent way, and that his remarks were always pertinent to the subject under discussion, and that he displayed no lack of intelligence. There is some other opinion evidence to the effect that Delaplain was incompetent to transact serious business, but it is not of forceful and decisive character, and it comes from only two or three persons. What is greatly relied upon is the fact that Mrs. Delaplain herself declared on several occasions that her husband had been unsettled in mind ever since the bank failure, and that Dr. Wilson declared that he was unable to transact business. At first view, these declarations of Mrs. Delaplain might be taken to be strong, but that is simply because she is the grantee in the deed. I doubt whether they are admissible, being merely unsworn statements of hers. But grant their admissibility; what do they show? Shall they be treated as admissions? They cannot be, because one cannot lose title to land by mere admissions: Suttle v. Richmond etc. R. R. Co., 76 Va. 284; Jackson v. Davis, 15 Am. Dec. 451, 455; High v. Pancake, 42 W. Va. 607. But then it is mere opinion. These declarations only enter into the case as items of evidence—as opinions of Mrs. Delaplain as to the mere condition of her husband; and they amount to nothing more, coming from her, than if coming from another person. They are simply her opinions, to be taken for what they are worth. Now take up the opinions on the [618] other side. We have the opinions of three utterly disinterested persons present at the time when the deed was made. They declared in unmistakable terms that at that time Delaplain was as intelligent as ever; knew the character of the act he was doing; did it deliberately, and was entirely competent to do it. This evidence of parties present at that time has more force than mere opinion of parties as to his sanity at other times, or, indeed, of his conduct and action at other times, because the time of the execution of the deed is the material or critical point of time to be con-

sidered upon the inquiry as to the grantor's capacity: Buckey v. Buckey, 38 W. Va. 168. One of the three persons present was the lawyer who drew the deed, and took Mr. Delaplain's acknowledgment. There is the evidence of the two copartners in the mercantile business, thrown into daily contact with him for years, who have sustained his competency. There are the depositions of three apparently intelligent people, who were servants in the house, and observed his daily conduct down to his death, attesting his capacity. Other witnesses give their opinions to the same effect; so that, as to opinion evidence, that going to sustain his sanity is vastly preponderating. I cannot detail it here, but it comes from those who had the best opportunity of judging of Delaplain's capacity. The evidence of a joint owner with him of a ranch in Texas shows that he talked intelligently to him, after he returned from Texas, about the farm; remembering and talking of persons with whom he became acquainted on a visit which he had made ten years before. He talked with him, before his visit to Texas and after, about their business interests, in an intelligent and business-like manner. Captain William List, who had known him so long, and talked with him almost every day—their places of business adjoining—attested his competency in strong terms.

Now let us leave the domain of mere opinion of witnesses as to Delaplain's capacity, and go to facts that speak for themselves. Here I will say that said transfers are attacked, not only because of the mental incapacity of Delaplain, but also because of undue influence exerted upon him by Henry K. List; and the facts I shall refer to—at least, some of them—answer both the allegation of [619] incapacity and undue influence. Delaplain thought of making a will. Let us say that List advised him so to do, and mentioned as a reason that he ought thus to protect his wife. Delaplain reflected upon it some days, and refused to do so. This tends strongly to negative incapacity and successful undue influence. Deliberation—unaided deliberation, his own deliberation against List's suggestion or advice—brought Delaplain's mind to this refusal. He told James P. Rogers, who acted as his lawyer, that he had thought of making a will, to keep his property from going to certain persons, but would not complete it then, but would think further about it. A few days later, Rogers received word, through List, that Delaplain wanted him to draw two deeds for him. Rogers went alone to Delaplain's store, when Delaplain told him he had thought of making a will, but would rather make deeds, and told him he wanted

to deed the homestead to his wife, and the store property to Mrs. Grubb. Rogers told him he could not make a deed directly to his wife, but must have an intermediary, when several persons were mentioned by Delaplain, but objections arose in his mind as to them, and Rogers suggested Ambrose S. List, a son of Henry K. List, and he was agreed upon. Then Rogers asked Delaplain whence his title came, and Delaplain told him, and he obtained descriptions of the property from what he told him. Delaplain spoke particularly of an agreement with one Hullihen's heirs years before, in connection with the home property, which he wanted him specially to hunt up, as it somehow concerned an easement of the home property, and he felt that there might be trouble about it. Rogers found the agreement on record, as Delaplain had said. After this deliberative conversation it was agreed that Rogers should come next day, at 10 o'clock, with the deeds; and at that hour Rogers found Delaplain on the sidewalk, at his store, as agreed. When Delaplain asked him if he had those papers, and was told that he had, he said, "Let us go up, then, to the City Bank," and they went. At the bank, Delaplain drew up to a window, and read the two deeds. He asked Rogers if he had examined the records as to the transfer of the property to him—particularly the agreement as to the alley in the rear of [620] the homestead. Delaplain said he was ready to execute one of the deeds. Then Henry K. List came in, and Delaplain showed him the deeds, and they talked about them; and Delaplain told List that he had made up his mind not to sign the deed to Mrs. Grubb, but preferred the other, to be closed at once; and he signed it, and put the Grubb deed in his pocket, and sent Rogers to have Mrs. Delaplain execute the deed to A. S. List, the intermediary. When Rogers returned, A. S. List was there, and it took some explanation to get him to sign the deed to Mrs. Delaplain, Delaplain and Rogers explaining it. Delaplain told him that he had chosen him, as he was out of debt, and a single man, and that there would be no liability on him from signing it. We see he did not want to convey to a man under liens, or even debts, or who had a wife that would fasten a dower right on the property. This shows great caution. Rogers left, leaving Delaplain and Henry K. List talking about their iron stocks. Then, too, Delaplain made a check to his wife for six thousand dollars, List drawing it; and it was placed to her credit in that bank, of which List was president. Several times before these transfers, Delaplain talked to List on the subject of taking some steps for the benefit of his wife, and

the transfer was but the execution of what he had been cogitating in his mind for some time. Such are the circumstances that constitute the res gestae of these transfers, and I need only say that they alone tell of the careful thought, deliberation, and competency of Delaplain. If under List's undue influence, why did he not execute a will as List suggested? He rejected that suggestion. Why did he not execute the Grubb deed? List admits that he did want to get Delaplain to make a will to protect Mrs. Delaplain, buf, when Delaplain refused, List dropped the matter. List declares that he did nothing, by suggestion or otherwise, to dictate the deeds; that Delaplain did not even ask him whether he ought to make them, nor did he say to Delaplain that he ought. List swears the action was Delaplain's deliberate, free action. So does Rogers. So does A. S. List. List seemed to be acting for Mrs. Delaplain's interests—the only motive, he says, that he had. She had probably requested him to do so. What of this? Mrs. Delaplain did nothing wrong, in soliciting her [821] husband to make provision for her in his failing health. Who had higher claims on him? List had known Delaplain many years—both prominent, successful business men of Wheeling; and after the closing of the Exchange Bank, Delaplain made deposits in the bank of which List was president, and they became more intimate than before. What if List did, in the interest of Mrs. Delaplain, advise Delaplain to make provision by will? He dropped the subject, however, when Delaplain refused. Look at the act of transfer itself. It speaks good sense, as well as love and justice to his aged wife. If he died, she would likely not get the homestead as dower; but this deed avoided this danger, and gave her the home in which she had so long resided. Without the check, she would have no ready money, but would have to await the action of an administrator, and the settlement of the estate, perhaps. If he made a will, she could not demand a legacy for a year. Why should he not, to meet instant wants, give her the home furniture, and some ready money—in all about twenty-two thousand dollars, out of from three hundred and twenty-five thousand dollars to three hundred and fifty thousand dollars. He knew these things would be a certainty, whereas his goods and bank and other stocks might, in the terrible panic, be lost or unavailable. See how he pondered over whether to make a will or not. He thought of doing so to restrain his property from going to certain persons, but finally concluded, after providing for the immediate needs of his wife, to let the law distribute it. He thought of giving Mrs. Grubb

the valuable store building, but finally concluded to let it go into distribution between her and his grandchildren. To me, all these things bespeak judgment, caution, and competency. Another circumstance tells of his competency. His young copartners wanted an arrangement by which the mercantile business could be continued, and wanted him to put a certain sum in; and he said to one of them: "No, Hull; you and Gibbs are young men, and if I place anything in there, and you would fail I would lose everything. If you haven't anything you ought to have." He talked with so much sense, though unwell, that one servant in the next room remarked to another that it would be hard to fool Mr. [622] Delaplain. This was two weeks before his death. He had signed a paper relating to the continuance of the business, by which he was to put in the business seventy-five thousand dollars, reflected over it, became dissatisfied, and requested its cancellation, said it ought to be canceled. One of the partners consented to its cancellation, and Delaplain was so thoughtful as to suggest that the other partner ought to be present.

In argument, the fact that the deeds were taken to List's bank before signing was urged as tending to show that Delaplain was under the bidding of List. We have seen how the evidence negatives this charge of undue influence; but this very circumstance furnishes additional evidence. A. S. List, the intermediary, was a clerk at that bank. They had to go there to see him. Delaplain did not intend to execute a deed to him, and then let the deed from A. S. List to Mrs. Delaplain be neglected, but went and saw A. S. List, and was particular to see the deed from List to his wife actually executed. This was prudence—business done in a businesslike way. I will add that by numerous witnesses it is proven that, when talking of business, the long-time arena of this old man, he talked—as he always had—with judgment and intelligence. Never once do we hear of his saying anything but what was intelligent as usual when talking of business. This is well attested. The evidence does show that after the bank failure he declined—clearly shows this; but the bulk of the evidence shows that this decline and weakness were physical, not mental. All these indicia point to one thing, unmistakably—the competency of Delaplain to do these acts. They point there so strongly that I am led to say that it would be a travesty upon justice for this court to defeat a deed deliberately made by this strong-minded old business man, giving to the aged partner of his bosom, when he knew she would outlast him, a small por-

tion of his estate, their old home, as a shelter over her head. Courts overgo their proper mark when they thus deprive a man of his right to do what he lists with his hard-earned property. If his wife disposed of this property with unfairness and partiality, we cannot help it. It is only with Mr. Delaplain's act that we have to deal. If human testimony is to be [623] credited, the three witnesses of the crucial moment prove Delaplain's full competency—a competency as strong as ever—to make the deed. But such strong competency is not required. Even if his mind were weak and debilitated, compared with what it had been, his demeanor on occasions eccentric, and even if he had not capacity to transact general business, yet if he understood, as he clearly did, the nature of that particular act—recollected the property he was disposing of, and the person to whom he was giving it, and how he desired to dispose of it—that is enough to make his act valid, as we held in Buckey v. Buckey, 38 W. Va. 168. Under this criterion—under any criterion which the books give us—this deed and check are valid.

I have above incidentally adverted to the charge of undue influence. There is no suggestion of undue influence emanating from anyone but Henry K. List. That is wholly sustained. There is no basis on which to assert it, but List's suggestion, in the interest of Mrs. Delaplain, to make a will, and to his presence when the deed and check were made, and to his telling Rogers that Delaplain wanted him to draw the deeds. These circumstances will not sustain this grave charge. Delaplain ignored this so-called undue influence, in refusing to make a will; and he himself originated, as his own preference, the act of doing what he wished by the deeds. List did not suggest this. How is it strange that Delaplain should talk to his old acquaintance about such things? Many do so. Undue influence to do what? Undue influence to make a transfer to List or his kindred? No; neither he nor any of his kindred got a dime. Undue influence to do what? To make a deed to give the home, and some ready money for maintaining it, to Delaplain's aged wife, in case of his death, in times of panic and financial distress, out of a large property. The very reasonableness and justice of the act dissipate the thin shadow of undue influence. A disposition of property, induced by gratitude for kindness, affection, and esteem, is not the result of undue influence: 27 Am. & Eng. Ency. of Law, 497. If all that is suggested against List's acts were fully true, it would not amount to "undue influence," in the eye of the law; for it must be of such a [624] nature as to over-

come the free agency: Forney v. Ferrell, 4 W. Va. 729. Both as to deeds and wills, "the underlying idea is that the influence must be such as to destroy free agency, and substitute the will of another for that of the person nominally acting": 27 Am. & Eng. Ency. of Law, 453. The highest court in the land has put the principle so strongly as to say that, to set aside a deed or will for undue influence, it must be shown "that the party had no free will, but stood in vinculis." "It must amount to force or coercion destroying free agency": Conley v. Nailor, 118 U. S. 127, 135. It is idle to say that this case remotely approximates this standard. "Suggestion and advice, addressed to the understanding and judgment, never constitute undue influence; neither does solicitation, unless the testator be worn out with the importunities, so that his will gives way. Even earnest entreaty, importunity, and persuasion may be employed, as well as appeals to remember past kindness or to relieve distress. The criterion in every case is, Is the influence irresistible? If it is, the will is not the instrument of the testator, and cannot stand. If it is not, the influence is not undue and its existence is immaterial, even though the testator did in fact yield to it": 27 Am. & Eng. Ency. of Law, 498; Redfield on Wills, 522, 524, 533. Greer v. Greer, 9 Gratt. 330, will strongly support me, both as to competency to do the act, and undue influence. Evidence was given that the widow of Delaplain's deceased son showed List a letter from her husband to his father, when List said that if he had known that sooner, things might have been different. List did not remember what was in the letter or how to explain what he meant. How are we to know, or to allow the circumstance weight? The letter or its contents are not in the record. Shall we grope in the dark to guess its contents and the meaning of List?

The deed is claimed to be no deed, for want of delivery. It is beyond question that the parties to this deed met for the purpose of completing it. The grantor signed it and acknowledged it, without a hint that it was to be withheld for any purpose; and this alone made it a deed, without formal words of delivery, as delivery depends on intent of parties, and, though not formal, may be shown by circumstances. [625] Acknowledgment alone is strong to show delivery: Furguson v. Bond, 39 W. Va. 561, 566. But there is further evidence than signing and acknowledgment. List says that Delaplain directed Rogers to take the deed to the clerk's office, and have it recorded. Rogers says in one examination that Delaplain so directed him, and that he put it on record. Of course, if Delaplain so directed, that was delivery. Rogers,

in another examination, says that Delaplain told him to take the deed to Mrs. Delaplain, and he did so, and she directed him to record. This was clear delivery. Rogers, from some cause—likely, neglect—did not record it until after Delaplain's death. But Delaplain, it is certain, parted with possession and dominion over the deed, and reserved no control over it; and it was, in Rogers' hands, as the custodian for the benefit of List, the intermediary grantee, a perfect deed. Delaplain reserved no right to recall it. This is quite different from the case where the grantor yet retains possession of a deed until his death as in Lang v. Smith, 37 W. V. 725. The very fact that the deed was not retained by Delaplain raises the presumption of delivery. The evidence of List and Rogers, in any view, proves actual delivery.

Decree affirmed.

DEEDS—VALIDITY—MENTAL INCAPACITY OF GRANTOR.—A deed will not be set aside for mental weakness of the grantor, in the absence of undue influence, unless such a degree be shown as rendered him incapable of understanding and protecting his own interests. The circumstance that his intellectual powers were somewhat impaired by age is not sufficient if he still retained a full comprehension of the meaning, design, and effect of his acts: Lindsey v. Lindsey, 50 Ill. 79; 99 Am. Dec. 489, and note. The fact that he is physically unable to look after his property is not sufficient if he still retains a full comprehension of the meaning, design, and effect of his acts at the time of the execution of the deed: Argo v. Coffin, 142 Ill. 368; 34 Am. St. Rep. 86, and note; Shea v. Murphy, 164 Ill. 614; 56 Am. St. Rep. 215.

DEEDS—VALIDITY—UNDUE INFLUENCE.—Undue influence, to render a deed void, must be of a character to deprive the grantor of free agency: Shea v. Murphy, 164 Ill. 614; 56 Am. St. Rep. 215, and note. The law as to undue influence has been largely developed in will controversies, which branch of the question is discussed in the monographic note to In re Hess' Will, 31 Am. St. Rep. 670-691.

DEEDS—SUFFICIENCY OF DELIVERY.—The question whether a deed has been delivered or not is one of intention; and it may be effected by words without acts, or by acts without words, or by both: See monographic note to Brown v. Westerfield, 53 Am. St. Rep. 541, as to what is a delivery of a deed.

CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

LANCTOT *v.* STATE.

[98 WISCONSIN, 136.]

MARRIAGE, PROOF OF FOREIGN, WHEN SUFFICIENT. If a foreign marriage is shown to have been solemnized in church by a person assuming the office of a priest or minister, it will be presumed, in favor of the marriage, that it is in accordance with the law of the country, and valid. If such a marriage is shown, especially if followed by cohabitation, the burden is on him who denies its validity to show that the law required some further act to make it valid.

EVIDENCE — CONFIDENTIAL COMMUNICATION BETWEEN HUSBAND AND WIFE, WHAT IS AND WHEN NOT ADMISSIBLE.—A letter which is claimed to be a confidential communication between a husband and wife is privileged and not competent to be received in evidence against either, if objected to by him or her. Hence, such a letter cannot be received in evidence against the person writing it to prove that he was the husband of the person to whom it was addressed or to identify him as one of the parties to an alleged marriage.

Prosecution for adultery in contracting a marriage with one Vienna Michaud while having a wife living. Witnesses testified to being present at the marriage of defendant and Octavia Arvasa in Quebec, and that the defendant afterward came to the state of Wisconsin and there married Vienna Michaud. The defendant testified that he was not the man Joseph Lanctot who had married Octavia Arvasa, and that his true name was John C. Harvey, and another witness testified to knowing him by that name. The state then offered, and the court received in evidence, against the objections of the defendant, letters alleged to have been written by him to his wife Octavia from various places, in which he addressed her as "Dear Wife," and subscribed himself as her "Devoted husband, Joseph Lanctot."

Others of the letters were not subscribed with his name, and one directed her to address Mr. John C. Harvey. The defendant, being convicted, appealed.

Howard Benton and Titus & McIntosh, for the plaintiff in error.

The attorney general, for the defendant in error.

138 NEWMAN, J. Two questions are presented: 1. Was the evidence of the former marriage sufficient to sustain the conviction? And 2. Was the reception of the letters in evidence prejudicial error?

The law relating to proof of foreign marriages seems to be that where a formal ceremony of marriage, solemnized in a church by a person assuming the office of a priest or minister, is shown, it will be presumed in favor of the marriage, that it is in accordance with the law of the country and valid. So, when such a marriage is shown, especially if followed by cohabitation, the burden is on him who denies the validity of the marriage to show that the law required some further act or fact to make it valid: 1 Bishop on Marriage, Divorce and Separation, secs. 1115-1122; Wharton's Criminal Law, 10th ed., sec. 1698, par. 1; Freeman's note to State v. Hodgskins, 36 Am. Dec. 742-745; Hutchins v. Kimmell, 31 Mich. 126; 18 Am. Rep. 164; People v. Loomis, 106 Mich. 250; Raynham v. Canton, 3 Pick. 293-297; Estate of Megginson, 21 Or. 387; 14 L. R. Ann. 540, and cases cited in the notes.

The letters received in evidence seem to have a cogent bearing upon the question of the identity of the plaintiff in error with the Joseph Lanctot who was the husband of Octavia Arvasa. It is not clear that they did not turn the scale against the plaintiff in error. That they did not cannot be demonstrated. Certainly the writer of the letters addresses 139 himself to Octavia as her husband, under the name of Joseph Lanctot, the real name of her husband. Identity of name is of some weight as evidence of identity of person. There came a time when he notified her, in effect, "My name is to be no longer Joseph Lanctot, but John C. Harvey." This circumstance seems to be well calculated to persuade the jury that John C. Harvey must be the genuine, original Joseph Lanctot, under an alias.

If these letters were in truth what they purport to be and what the state represented them to be, they were confidential communications between husband and wife, which are privi-

leged and protected, and not competent to be received in evidence against the objection of either. It is difficult to conceive of any theory on which they could, consistently, be either offered or received. Certainly, to offer them was utterly inconsistent with the state's hypothesis of the case. That was that the plaintiff in error was the husband of the party to whom the letters had been written. On this hypothesis, the letters were, clearly, confidential communications between husband and wife, and so incompetent. Their admission was reversible error: Selden v. State, 74 Wis. 271; 17 Am. St. Rep. 144.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison at Waupun will deliver the prisoner, Joseph Lanctot, to the sheriff of Bayfield county, to be held in custody by him until he shall be discharged therefrom according to law.

MARRIAGE—PROOF OF FOREIGN—WHEN SUFFICIENT.—Where ceremonies of marriage in a foreign country, with cohabitation following it, are shown, it is presumptively a valid marriage, and it is not necessary to prove the foreign law of marriage: Hutchins v. Kimmell, 31 Mich. 126; 18 Am. Rep. 164. Marriage in a foreign state may be proved by the testimony of any person who was present at the ceremony, provided it is also shown to have been valid according to the laws of the country in which it was celebrated: State v. Kean, 10 N. H. 347; 34 Am. Dec. 162. See monographic note to Appeal of Reading Fire Ins. etc. Co., 57 Am. Rep. 451-463, as to when a presumption of marriage arises, and the evidence necessary to prove a marriage.

CLANCEY *v.* ALME.

[98 WISCONSIN, 229.]

HOMESTEAD—PROCEEDS OF THE SALE OF AND OF OTHER PROPERTY.—If a homestead is included in a mortgage with other lands, and all are sold for a sum in excess of that due upon the mortgage, the surplus remaining after the payment of the mortgage debt will be deemed the proceeds of the sale of the homestead and exempt from liability for the debts of its owner, where the lands not included in the homestead are worth less than the amount of the mortgage debt.

Suit to foreclose a mortgage including the homestead of the defendant and other real property. All the mortgaged premises were sold as one parcel, realizing sufficient to pay the mortgage debt and leaving a surplus. The defendant was the defendant in another judgment in favor of the appellant Clancey, which was a lien on the mortgaged property not included in the homestead claim, and this judgment creditor claimed the sur-

plus remaining after the payment of the plaintiff's judgment. The court awarded to the mortgagor the money remaining, and the judgment creditor, Clancey, appealed.

E. K. Loverud and W. W. Gilman, for the appellant.

H. A. Huber and Erdall & Swansen, for the respondents.

230 NEWMAN, J. The question presented is not difficult of solution. All the principles involved in its solution have been settled by the decisions of this court. The right of the owner to have his homestead exempt from "liability in any form" (Rev. Stats., sec. 2983) for his debts is superior to the equity of a creditor to have it applied to the payment of his debt. However it may have been formerly and in the absence of a statute declaring his right, it is now the settled policy of the law to prefer the homestead right as against the rights of creditors: Hanson v. Edgar, 34 Wis. 653; Smith v. Wait, 39 Wis. 512; Rozek v. Redzinski, 87 Wis. 525. In furtherance of this benevolent purpose, the proceeds of the sale of the homestead are made exempt from liability for the debts of the owner "while held with the intention to procure another homestead therewith": Rev. Stats., sec. 2983. It has been held, in harmony with the liberal spirit of the exemption laws, that where a homestead which is encumbered with other property by a common mortgage is applied by the owner, along with the other property, as one parcel, to the payment of the mortgage debt, a surplus remaining after the payment of the debt will be deemed proceeds of a sale of the homestead, and exempt from liability for the debts of the owner of the homestead. This was in a case where the value of the property not included in the homestead was less than the amount of the mortgage debt, so that it would not alone have sold for enough to realize the debt: Binzel v. Grogan, 67 Wis. 147; Hoppe v. Goldberg, 82 Wis. 660.

231 This principle is entirely applicable to the case of a surplus arising from a foreclosure sale of property similarly situated. Here the lands not included in the homestead were worth much less than the mortgage debt. The mortgage debt was upward of three thousand nine hundred dollars. The value of the lands not included in the homestead was about sixteen hundred dollars. The sale was for four thousand six hundred dollars. The respondents desire to use the surplus moneys to procure another homestead.

By the Court. The order of the circuit court is affirmed.

HOMESTEAD—EXEMPTION OF PROCEEDS OF SALE FROM EXECUTION.—When the homestead or any part of it is converted into money or other personal property without the voluntary act of the owner or owners, there is certainly no intentional or implied waiver of the exemption, and, equitably at least the proceeds of such conversion ought to be regarded as still impressed with and protected by the homestead exemption: Extended note to Morgan v. Rountree, 45 Am. St. Rep. 238. But the proceeds of a voluntary sale are not exempt from execution though the sale was made with the intention of purchasing another homestead with the proceeds: Freiberg v. Walzem, 85 Tex. 264; 34 Am. St. Rep. 808; Wright v. Westheimer, 2 Idaho, 962; 35 Am. St. Rep. 269. Compare Schuttloffel v. Collins, 98 Iowa, 576; 60 Am. St. Rep. 216, and note.

SCHUSTER *v.* ALBRECHT.

[98 WISCONSIN, 241.]

WATERS—RIGHT TO DRAIN SO THAT THEY WILL REACH THE LANDS OF ANOTHER.—The owner of a pond has no right to conduct it by an artificial channel to a point on his own land, in close proximity to his line, where it must permeate the surrounding soil and percolate through into his neighbor's lands to the latter's permanent injury.

Suit to enjoin defendant from constructing on his own land a drain which will take waters from a pond thereon to the immediate neighborhood of the complainant's land to a point from which they must percolate through the soil to the lands of the complainant to his injury. Injunction as prayed for, and the defendant appealed.

Fehlandt & Whelan, for the appellant.

Jones & Stevens, for the respondent.

244 WINSLOW, J. The findings of fact seem to be supported by the evidence, but, even if they were not, there are no exceptions to the written findings preserved in the bill; hence, in any event, they cannot be reviewed.

It was held by this court in Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50, that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it, through an artificial channel, directly upon the land of another, greatly to his injury. As between private individuals, where no question of public duty or authority is involved, 245 this principle has not been infringed upon, but has been recently reaffirmed by this court: Wendlandt v. Cavanaugh, 85 Wis. 256. In the present case, the owner of the pond did not propose to discharge the water directly upon his neighbor's land, but proposed to

conduct it, by an artificial channel, to a point on his own land in close proximity to the line, where it would inevitably permeate the surrounding soil and percolate through the same into his neighbor's land, and permanently injure the same. We perceive no logical difference between the quality of the two acts. In either case there is a permanent injury to his neighbor's land, caused by water conducted thereto by an artificial channel; and the injury caused by percolation artificially caused may easily be as great, or greater, than the injury caused by direct discharge in a stream: Gould on Waters, sec. 271.

By the Court. Judgment affirmed.

WATERS AND WATERCOURSES—LIABILITY FOR PERCOLATION.—One having artesian wells upon his land, and so using them that the water therefrom forms in a pool and thence percolates beneath the surface so as to injure the land of an adjacent proprietor, is answerable in damages for the injuries thus occasioned: Parker v. Larsen, 86 Cal. 236; 21 Am. St. Rep. 30, and note.

WATERS AND WATERCOURSES—CONFLICTING RULES AS TO SURFACE WATER.—Two opposing rules regarding the right to dispose of surface waters are still contending for supremacy in this country: See monographic notes to Goddard v. Harpswell, 30 Am. St. Rep. 390. The common-law rule allows a landowner to expel surface waters from his land without regard to the injury thereby occasioned to another proprietor, but under the civil law he has no right to do this: Note to Kansas City etc. R. R. Co. v. Smith, 48 Am. St. Rep. 588. See Jacobson v. Van Boening, 48 Neb. 80; 58 Am. St. Rep. 684, and note.

SANTA CLARA FEMALE ACADEMY *v.* NORTHWESTERN NATIONAL INSURANCE COMPANY.

[98 WISCONSIN, 257.]

INSURANCE—WAIVER OF CONDITION AS TO TITLE.—Notwithstanding any condition in a policy of insurance prohibiting waiver of conditions therein except in writing indorsed thereon and attached thereto, if an agent delivers a policy and receives the premium with knowledge of a breach of the condition in the policy respecting the sole and unconditional ownership of the title to the property, such condition is thereby waived. This is true notwithstanding the policy contains a provision prohibiting an agent from waiving any of its conditions except by writing thereon or attached thereto.

INSURANCE—INSURABLE INTEREST IN ANOTHER PERSON, WHEN DOES NOT DIMINISH THE AMOUNT OF THE RECOVERY.—If a person for whom a building is in process of construction procures insurance thereon, the agent issuing the policy knowing that the contractors also have an insurable interest

in the building, the insurer, on the destruction of the building, may recover the entire amount of the loss, though the contractor also had an insurable interest.

INSURANCE—TOTAL DESTRUCTION OF A BUILDING, WHAT IS.—If the statute provides that when real property covered by an insurance shall be wholly destroyed, the amount written in the policy shall be taken to be the true value of the property insured and the true amount of loss and measure of damages when destroyed, it is not necessary to a total loss that the property insured shall be annihilated or reduced to a shapeless mass. When the identity of the structure as a building is destroyed, so that its specific character as such no longer remains, and there is nothing left but cellar walls and dilapidated foundations, the loss is total within the meaning of the statute.

INSURANCE—TOTAL LOSS—WHAT IS.—Total loss does not mean the absolute extinction of a building. The test is, whether the building has lost its identity and specific character, so that it can no longer be called a building. If, though some part of the building remains standing after a fire, that part is not sufficient to constitute in any sense a building, then, in contemplation of law, there has been a total loss. A total loss is not necessarily negatived by the fact that there is left standing some part of the building, worth more in place than the cost of removing it.

INSURANCE AGAINST LOSS BY FIRE.—Though the contractor of a building in process of construction is bound to reconstruct it after its destruction by fire, this does not entitle the insurer to any diminution in the amount for which it is answerable upon a loss by such destruction.

INSURANCE—AMOUNT OF RECOVERY WHEN SEVERAL PERSONS HAVE INSURABLE INTERESTS.—If an insured has some insurable interest in the property insured, the whole amount of damages to the property not exceeding the amount named in the policy is recoverable by him, if the damages thereto reached that sum, though another person also has an insurable interest therein.

INSURANCE ON BUILDING—LIABILITY OF CONTRACTOR TO RECONSTRUCT, WHETHER DIMINISHES AMOUNT OF RECOVERY.—Where the owner of a building in process of construction insures it, the fact that the builder, on its destruction, before completion, is bound to reconstruct it, and does so, does not limit the amount which the owner is entitled to recover of the insurer.

Bashford, Aylward & Spensley, for the plaintiffs.

H. W. Chynoweth, for the defendants.

203 MARSHALL, J. The questions presented on these appeals are: 1. Were the policies void because of a breach of the condition in respect to the title of the assured being sole and unconditional? 2. If the condition in that regard was waived, did the policies cover the entire building, or only the interest of the plaintiffs? 2. What is the amount for which the defendants were liable under the policies? 4. Has such amount been diminished by the completion of the building by the contractor under his obligation so to do? 5. Did the court err in not lim-

iting the attorney's fees taxed and included in each judgment to twenty dollars? These questions will be considered in their order.

1. No question is raised but that H. B. Hobbins, who took the application for the insurance, received the premiums, and delivered the policies, was the agent of defendants within [264] the meaning of section 1977 of the Revised Statutes, and competent at the time the policies were delivered to waive the condition therein in respect to title, notwithstanding the clause prohibiting any waiver of the conditions or provisions of the policies except in writing thereon or attached thereto. The law in that regard is firmly established, and nowhere more so than by the decisions of this court: Renier v. Dwelling House Ins. Co., 74 Wis. 89; Goss v. Agricultural Ins. Co., 92 Wis. 233; Carey v. German-American Ins. Co., 84 Wis. 80; 36 Am. St. Rep. 907; Dowling v. Lancashire Ins. Co., 92 Wis. 63. Such decisions, and numerous others, are to the effect that if the agent delivers a policy of insurance and receives the premium, with knowledge that the title to the property insured is other than sole and unconditional, it is in effect the act of the company and constitutes an effectual waiver of the conditions in that regard. Such cases rule this, as there is no reasonable controversy but that Hobbins knew substantially all the facts in regard to the interest of the contractor, McAlpine, in the building, which is the only interest claimed to have existed in breach of the condition under consideration. True, there is no direct evidence that Hobbins knew the exact terms of the building contract, but he knew that the construction of the building was going on under contract with McAlpine, and advised plaintiffs to insure it to the full amount of fifteen thousand dollars, because, as he said, he did not know McAlpine. There is no reasonable explanation of this other than that the agent assumed that the contract was entire, but that, in his judgment, plaintiffs should insure the building in their own names for all it would carry, for their protection, independent of the liability of the contractor, "because he [Hobbins] did not know him." That shows, if it shows anything, that the agent knew that the contractor had a builder's interest in the structure, and that his opinion in that regard would not have been more definite if he had seen and read the contract. The trial court was right in considering such facts established conclusively by [265] the evidence, and holding the policies binding on defendants, freed from the condition in respect to the title.

2. The question of whether the whole building was insured, or only the interest of plaintiffs, is practically answered by what has preceded. The claim that the intention was to insure only that part of the building which had been accepted, that is, the foundation, is without any evidence or a single circumstance in the case to support it, except the testimony of the agent Hobbins that he was not requested, and did not intend, to insure the builder's interest. That was his conclusion, which counts for nothing in the case as against what was actually said and done. He testified that the plaintiffs applied for twenty thousand dollars of insurance; that he influenced them to make it twenty-five thousand dollars; that he inquired who the contractor was, and on being informed in that regard said he did not know him and would advise plaintiffs to insure the building then; that his language was: "I told them I would bind that amount of insurance on the building in the condition it then was"; that thereupon the whole matter was left to him, and he placed the fifteen thousand dollars of insurance and agreed to place ten thousand dollars additional when the building was nearer completion. In view of that evidence, the fact stands out prominently and beyond reasonable dispute that Hobbins and plaintiffs intended to insure the entire building at a valuation of fifteen thousand dollars as it stood when the policies were issued.

3. On the question of whether the building was wholly destroyed, the evidence appears to be quite as conclusive as on the other questions discussed. It was practically annihilated down to the foundation, and that was so injured that about half of the original cost was required to put it in shape for use again. A considerable portion of it had to be removed down to the footing stones, and the balance required extensive repairs. As a matter of law that was a total destruction of the building within the meaning of section 1943 [266] of the Revised Statutes, which provides that when real property, covered by insurance, "shall be wholly destroyed, ... the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed." That statute has been several times construed heretofore, and most recently in Lindner v. St. Paul etc. Ins. Co., 93 Wis. 526, where it was held, in effect, that total loss under the statute does not mean that the material of which the building is composed shall be annihilated or reduced to a shapeless mass; that when the identity of the structure as a building is destroyed, so that its specific

character as such no longer remains and there is nothing left but the cellar walls and a dilapidated foundation, the loss is total within the meaning of the statute. There are many authorities elsewhere to the same effect, and it is so laid down by standard textwriters.

In May on Insurance, section 421 a, it is said that "total loss exists when the building has lost its identity as such, so that it cannot be designated as a building, though some part of it may yet be standing." In Hamburg-Bremen etc. Ins. Co. v. Garlington, 66 Tex. 103, 59 Am. Rep. 613, it was said, in effect, that total loss does not mean an absolute extinction of the building; that the test is whether the building has lost its identity and specific character so that it can be no longer called a building. To the same effect are Williams v. Hartford Ins. Co., 54 Cal. 450; 35 Am. Rep. 77; Beach on Insurance, sec. 1291, and Wood on Fire Insurance, sec. 107. In Oshkosh Packing etc. Co. v. Mercantile Ins. Co., 31 Fed. Rep. 200, the term "wholly destroyed," as used in our statute, was considered and construed as not meaning more than such destruction of the building as that, though some part still remains standing, it cannot be longer designated as a building. Evidently, from the report of the case, some part of the building covered by the policy under consideration was left standing after the fire; yet, as there was no controversy [267] but that such part was not sufficient to constitute, in any sense, a building, the court held as a matter of law that such building was wholly destroyed and the loss total.

There are authorities to the effect that if there is any part of the building left, worth more in place than the cost of removing it, the destruction is not complete within the meaning of valued policy statutes. In Ostrander's work on Fire Insurance, second edition, section 310, and in an article on the subject found in 33 Central Law Journal, 319, written by a prominent member of the bar of this court, it is contended that such is the correct construction of our statute, and that this court has impliedly, if not directly, so held, and referred the words "totally destroyed" to the value of the thing insured instead of the thing itself. It is not considered that there is any legitimate warrant for such view in anything said by the court in its published opinions. In Harriman v. Queen Ins. Co., 49 Wis. 71, where the building was destroyed down to the foundation, and that was injured so as not to be in suitable condition for use in a new building, the court said the destruction, within the meaning of the statute, was total, but declined to lay down any rule ap-

plicable to other cases, and did not place the decision on the theory that the destruction contemplated by the statute was solely that of value. In Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, while it was stated that there was no part of the building left standing, of any value, the decision that the destruction was total was placed on the ground that the identity of the thing insured was so far annihilated that it no longer existed as a building. The authority referred to and approved was Wood on Fire Insurance, section 107, to which one of the cases cited is Harriman v. Queen Ins. Co., 49 Wis. 71. The textwriter says: "Loss is total within the meaning of the term when the identity and specific character of the thing insured is destroyed, although there is not an absolute extinction of the parts." As best illustrating the rule, Judah v. Randal, 2 Caines Cas. 324, [268] is cited, where the property insured was a carriage. It was all destroyed but the wheels. The court held that the destruction was complete as applied to the specific thing insured, the carriage. That was followed in Lindner v. St. Paul etc. Ins. Co., 93 Wis. 526, as the settled doctrine of this court. Our statute deals with the specific thing insured, not solely the value. Its purpose was not only to prevent frauds by over-insurance, but to remove the temptation, on the part of insurance companies, to demand and secure settlements for losses for less than the amounts called for by the contracts of insurance, where the structures insured have been, as such, substantially destroyed. To hold that, notwithstanding the statute, salvage can be claimed for any value left after a fire even down to the footing stones of foundation walls, would be contrary to the uniform holding of this court on the subject, and of courts elsewhere under similar statutes, and would render the statute ineffectual to accomplish what it was designed to accomplish.

It follows from the foregoing that the evidence in this case establishes conclusively a case of total destruction of the building within the meaning of our statute; hence that the amount named in the policies of insurance correctly measured the plaintiffs' damages at the time of the fire.

4. But it is said the policies of insurance were contracts of indemnity, and as the builder, McAlpine, was bound to reconstruct the building after the fire and did so, plaintiffs were fully indemnified except as to the foundation, which was accepted before the policies were issued, and cannot recover in excess of the loss for which indemnity has not been received. The weakness of this contention is threefold:

(a) The mere fact that the building was restored by the contractor does not show that such restoration was pursuant to the obligation of the building contract, independent of any claim for indemnity by the contractor against the [269] plaintiffs on account of the insurance clause in such contract, and the insurance of the building by them for an amount sufficient to cover the entire title thereto, including the interest of plaintiffs and such contractor. It was as competent for the builder to waive the provision that the insurance should be in his and the owners' names, loss payable to the parties as their interests might appear, as it was for the defendants to waive the condition of the policies against sole and unconditional ownership. Again, it was competent for plaintiffs to insure the whole building in their own names by the consent of the builder, notwithstanding the terms of the building contract provided otherwise, and such consent could have been given expressly or by implication. So the whole question between the plaintiffs and the builder, McAlpine, so far as appears from any proof in the case, is open.

(b) If the plaintiffs were indemnified by their contractor under his obligation to complete the building, and the defendants desired to rely upon that fact to reduce the damages otherwise recoverable under the policies, they should have set up such facts in the answers as a defense, and established them by evidence on the trial. No such defense appears to have been so pleaded or established, so the policies must stand unaffected by any claim for a reduction of the recovery thereon by reason of any claim that the plaintiffs have been otherwise indemnified.

(c) It being conceded that the plaintiffs had an insurable interest, and it having been decided that the condition in the policies in respect to sole and unconditional ownership was waived, and that the undisputed evidence makes a case of total destruction of the property insured, calling for payment of the face value of the policies as liquidated damages, that amount cannot be diminished by the fact alone that some other person, whom the plaintiffs had a right to represent, also had an interest in the building, even though such [270] person was required by contract to reconstruct such building. It is well settled that in the absence of fraud or mistake, unless otherwise provided by the contract of insurance, if the insured has some insurable interest in the property covered by such contract, the whole amount of damages to the property, not exceeding that named in the policy, is recoverable by such person if the damages thereto reach that sum, or if, by the contract itself and the law governing the sub-

ject, the face value of the policy must be taken as liquidated damages: Andes Ins. Co. v. Fish, 71 Ill. 620; Trade Ins. Co. v. Barracliff, 45 N. J. L. 543; 46 Am. Rep. 792.

5. Plaintiffs claimed the right to recover twenty dollars attorney's fees, under chapter 235 of the Laws of 1893, and twenty-five dollars under the general fee bill as well, against each defendant, and prevailed on such claim. That is assigned as error. Such chapter provides that several insurance companies, interested in the same loss, may be joined as defendants; that in case of a recovery against them, separate verdicts and judgments shall be rendered; and that there shall be included in each such judgment an attorney's fee of twenty dollars. In a proper case for such joinder of defendants, if separate actions are brought, they may be consolidated on motion, under section 2792 of the Revised Statutes: Gross v. Milwaukee Mechanics' Ins. Co., 92 Wis. 656. When so consolidated, the provisions of the act of 1893 as to costs apply, the same as if one action had been brought against all in the first instance, as permitted by law. It is considered that such provisions are exclusive and limit the attorney's fee to twenty dollars against each defendant, and that the ruling of the trial court to the contrary was error.

It follows from the foregoing that each of the insurance companies is liable to the plaintiffs for the full amount mentioned in its contract of insurance, and that the trial court should have directed verdicts accordingly, at the close of the evidence, on plaintiffs' motion therefor. But, in accordance [271] with the established practice of this court where there is no verdict left undisturbed by the result here upon which a judgment can be rendered when the case again reaches the trial court, the judgments appealed from must be reversed on plaintiffs' appeals as to damages, and on defendants' appeal as to costs, and the cause be remanded for a new trial.

The Court. On plaintiffs' appeals the judgments are reversed as to damages, and on defendants' appeals such judgments are reversed as to costs. Full costs are allowed to plaintiffs in this court on their appeals, except that only one-fourth of the costs for printing their case and brief shall be taxed on each appeal. Defendants are allowed clerk's fees on their respective appeals, but no other costs.

INSURANCE — WAIVER OF CONDITIONS — POWER OF AGENTS.—Notice to an agent of facts material to the risk is notice to the insurer: Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400; 57

Am. St. Rep. 140, and note. But agents of insurers possessing limited power to solicit insurance, deliver policies, and receive premiums cannot waive conditions and forfeitures: Note to Taylor v. State Ins. Co., 60 Am. St. Rep. 215. Though a policy of insurance provides that no officer, agent, or other representative of the company shall have power to waive any provision or condition therein, except such as by the terms of the policy may be indorsed thereon or added thereto in writing, such restriction does not apply to the making of the contract, but only to matters arising after it has become effective: Hartford Fire Ins. Co. v. Keating, 86 Md. 130; 63 Am. St. Rep. 499, and note. See Wilson v. Commercial Union Assur. Co., 51 S. C. 540; 64 Am. St. Rep. 700, and note.

INSURANCE — FIRE — TOTAL LOSS OF BUILDING. — The words "wholly destroyed" and "total loss" are generally given the same meaning, and, when applied to a building or structure, do not require that the materials of which it is composed shall be utterly destroyed or obliterated, but only that the building, though some part of it remains standing, shall have lost its identity and specific character, and have become a broken mass, so that it can no longer, with propriety, be designated as a building: See monographic note to Royal Ins. Co. v. McIntyre, 59 Am. St. Rep. 810, 811.

INSURANCE — AMOUNT RECOVERABLE — OUTSTANDING INSURABLE INTEREST. — Agents, commission merchants, or others having custody and being responsible for property, may insure in their own names, and may recover from the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property: Western etc. Pipe Lines v. Home Ins. Co., 145 Pa. St. 346; 27 Am. St. Rep. 703; Roberts v. Fireman's Ins. Co., 165 Pa. St. 55; 44 Am. St. Rep. 642. The same is true as to one who holds the legal title to real estate in trust for another: Rochester Loan etc. Co. v. Liberty Ins. Co., 44 Neb. 537; 48 Am. St. Rep. 745; and of a purchaser in possession before conveyance: Aetna Fire Ins. Co. v. Tyler, 16 Wend. 385; 30 Am. Dec. 90; Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568; 29 Am. Rep. 271.

AMES v. STORER.

[98 WISCONSIN, 372.]

A FORECLOSURE SALE DIVESTS the title of all the parties to the suit, and hence the mortgagor plaintiff therein cannot assert against the purchaser tax titles held by him prior to such sale.

Action by the plaintiff Ames to quiet title to certain real property. His title was based on the foreclosure of a mortgage by the defendant Storer. The latter claimed that before the sale he had purchased the property at certain sales for taxes delinquent thereon, and that the purchaser, before the sale, had agreed to pay the amount expended, in making such tax purchases. The trial court found that such agreement had not been made, and entered a decree quieting the title notwithstanding the certificates of tax sales held by the defendant Storer.

Phil. H. Perkins and Burr W. Jones, for the appellant.

McCausland & Smith, for the respondent.

378 PINNEY, J. 1. Whether, as contended by the defendant Storer, it was agreed at the time of the foreclosure sale, and in consideration thereof, that the purchaser, Finch, assumed the payment of the four tax certificates, with interest, costs, and charges which Storer held against the premises, and to reimburse him therefor, was a controverted question of fact, upon which the evidence is so conflicting that it is impossible to say that the finding of the court adverse to the contention of the defendant is against the clear preponderance of the evidence. We cannot, therfore, interfere to reverse this finding, and a discussion of the evidence upon which it is founded would lead to no profitable result. The parties neglected a salutary precaution in such cases, by failing to fully complete the business in hand, or to commit their agreement to writing; and after the foreclosure sale had been completed by the execution and delivery of the necessary 379 deed and the payment of five thousand five hundred and fifty-one dollars and forty-six cents, the amount of the bid, the present controversy about the amount of the tax certificates occurred, which gave rise to the present action.

2. The general rule is stated to be: "A purchaser at a mortgage foreclosure sale acquires all the title and interest of both the mortgagor and mortgagee in and to the property. The court undertakes to dispose of the interests of the parties to the suit in the land, and the purchaser acquires those interests, whatever they may be. And it has been said that a sheriff's sale of real estate under a judgment recovered by scire facias upon the mortgage passes to the purchaser the title to the mortgaged premises, discharged of all equities—even of those of which the mortgagee had no notice or knowledge": Wiltsie on Mortgage Foreclosure, sec. 577. In Tallman v. Ely, 6 Wis. 244, the court, speaking on the subject, said: "Whatever estate or title the mortgagee had in the mortgaged premises became merged in the decree, and passed to the purchaser at the judicial sale. Whatever estate or title the other parties to the suit had at its commencement passed by the same act to the same party. Such, it would seem, must be the necessary and inevitable consequence and result of the decree of foreclosure and sale, if any effect whatever is given to them."

Whatever doubt may have existed upon this subject has been put at rest by the statute (Rev. Stats. 1878, sec. 3169), which

provides that, upon any foreclosure sale being made, "the sheriff or referee making the same, on compliance with its terms, shall make, execute, and deliver to the purchaser a deed of the premises sold, setting forth each parcel of land sold to him, and the sum paid therefor, which deed, upon confirmation of such sale shall vest in the purchaser all the right, title, and interest of the mortgagor, his heirs, personal representatives, and assigns, in and to the premises sold, and shall be a bar to all claim, right, or equity of redemption therein, of and against the parties to such action, [380] their heirs, and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered." The referee's deed to Finch, the purchaser at the foreclosure sale, upon the confirmation of such sale, passed to him whatever right, title, or interest the defendant Storer had in and to the premises sold, whether under the tax certificates in question, or either of them, or otherwise.

For this reason, and in view as well of the finding of the circuit court already noticed, the defense of Storer utterly fails; and it is not material to consider or determine whether the purchase by Storer of the tax certificates in question operated as a redemption of the lots from such tax sales, or as a payment of the taxes thereon. In any view, therefore, that may be taken of the case, the judgment of the superior court is correct.

By the Court. The judgment of the superior court is affirmed.

MORTGAGES—FORECLOSURE—EFFECT OF DECREE AND SALE.—A decree of foreclosure concludes the rights of all the parties to the action, and the sale thereunder, consummated by the sheriff's deed, passes as against them, the entire estate held by the mortgagor at the date of the mortgage: Montgomery v. Middlemiss, 21 Cal. 103; 81 Am. Dec. 146. Third persons, not made parties to the suit, and claiming an interest in the property included in the mortgage, are not affected by the decree and may afterward assert their rights in such property: Racine etc. R. R. Co. v. Farmer's etc. Co., 49 Ill. 331; 95 Am. Dec. 595.

BORDEN *v.* DAISY ROLLER MILL COMPANY.

[98 WISCONSIN, 407.]

JURY TRIAL—NEGLIGENCE, WHEN A QUESTION FOR THE JURY.—It is only when the evidence and all reasonable inferences to be drawn therefrom are in one way in respect to a fact in issue that the trial court is warranted in taking it from the jury. Hence in an action for injuries received from the slipping of a ladder on which the plaintiff was working, it is error to charge the jury, as a matter of law, that the ladder was defective for want of spikes to prevent its slipping. A ladder is a simple contrivance; the danger attending its use is a matter of almost common knowledge, and it is easy for a person using it to inform himself whether it is spiked to prevent its slipping. Hence it is error to charge the jury that the defendant, in the exercise of ordinary care, ought to have apprehended that some person might not make the requisite examination, and therefore might be injured in consequence of its condition.

NEGLIGENCE, CONTRIBUTORY.—One who is experienced in the use of ladders on the floors of mills and has good opportunities to know whether a ladder used by him is in a defective condition and the consequences which might result from its use while in such condition, and who uses a ladder having no spikes to prevent its slipping, and is injured because of its slipping and falling, is guilty of contributory negligence precluding his recovery for the injuries received.

NEGLIGENCE, CONTRIBUTORY.—If it is negligent for the owner of a mill to have a ladder without any spikes in the bottom to prevent its slipping, it is equally negligent for a person experienced in the use of ladders under such circumstances, and having an ample opportunity to discover the condition of the ladder, to use it without making any test or inspection, and for his injury due to his negligence in this respect he cannot recover.

MASTER AND SERVANT—DUTY OF SERVANT IN RESPECT TO DEFECTS IN TOOLS AND APPLIANCES.—A master may rely on the duty of his servant to observe the defects and dangers which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work.

Action to recover compensation for injuries received by the plaintiff while in the employ of the defendant from the slipping of a ladder, it being defective in not having spikes in the bottom to prevent such slipping. The plaintiff was an experienced workman familiar with the use of ladders and accustomed to work thereon in the defendant's mills. Having necessity for the use of a ladder, the plaintiff took one, placed it in position without making any examination to ascertain whether it had spikes in the bottom to prevent its slipping. It, in fact, had none, and hence slipped and fell, severely injuring the plaintiff. The defendant asked that the jury be instructed to return a verdict in its favor. The request was refused. The court, on the other hand, charged the jury that the ladder was defective for want of

spikes to prevent its slipping, and that plaintiff was entitled to recover, unless, by the exercise of ordinary care, the plaintiff should have discovered the defect. Verdict and judgment for the plaintiff; the defendant appealed.

Ross, Dwyer & Hanitch, for the appellant.

Crownhart, Owen & Foley, for the respondent.

408 MARSHALL, J. It is only when the evidence, and all the reasonable inferences from evidentiary facts established thereby, are one way in respect to a fact in issue, that the trial court is warranted in taking it from the jury. Testing the evidence in the record by that familiar rule, the instruction given by the trial court to the effect that the ladder was defective and the defendant guilty of actionable negligence as a matter of law, unless plaintiff was guilty of contributory negligence, was a clear invasion of the province of the jury.

409 Whether a tool is defective, so as to render the person responsible for its reasonable safety for use liable for damages to an employé injured by some failure of duty in that regard, must be determined in the light of all the circumstances bearing on the question, and particularly the right of such person to rely on the duty of such employé to exercise ordinary care for his own safety. A ladder is one of the most simple contrivances in general use. The danger attending such use is a matter of almost common knowledge, and is particularly within the knowledge of men engaged in such work as that in which plaintiff was employed when injured. Under all the circumstances, in view of the very simple character of such a tool, the ease with which plaintiff could have informed himself as to whether there were points in the bottom of it, the obvious dangers which would naturally suggest to such a person the necessity of familiarizing himself with its character in that regard before using it, and to guard against its tendency to slip on the floor, and many other things that might be mentioned, clearly, the court was not warranted in finding, as a matter of law, that the officers and agents of the defendant, whose duty it was to act in its behalf, in the exercise of ordinary care, ought reasonably to have apprehended that some person, who might use the ladder in and about defendant's work, might be injured as a natural and probable result of its condition. That is an essential test of actionable negligence: Sheridan v. Bigelow, 93 Wis. 426; Deisenrieter v. Kraus-Merkel Malting Co., 97 Wis. 279. Such test was evidently overlooked

or not appreciated by the learned trial judge, else he would have at least submitted the question to the jury under proper instructions.

It is further assigned as error that the court refused to direct a verdict for defendant, and to set aside the verdict as against the evidence. There was no question in the case as to plaintiff's being an experienced workman in the use of [410] ladders on floors in mills; no dispute but that he had as good an opportunity as defendant for knowing of the defects in the ladder, if any existed, and all the probable consequences that might follow; no dispute but that he might, by an instant's inspection of the ladder, have found out its exact condition; no dispute but that he selected the ladder and used it without any sufficient, or really any, inspection in regard to its being furnished with points to prevent its slipping on the floor; in that state of the case, under the well-settled rule that an employé is chargeable with knowledge of all the dangers that are apparent to such observation as men of ordinary care, under the circumstances of the situation, would be likely to make, and the duty to guard himself against injury therefrom (Jones v. Sutherland, 91 Wis. 587), and that if, by reason of such dangers, he is injured, he is remediless by reason of his contributory fault—the plaintiff clearly assumed the risk of using the ladder in the condition it was: Powell v. Ashland Iron etc. Co., 98 Wis. 35.

The case of Holt v. Chicago etc. Ry. Co., 94 Wis. 596, seems to rule this. There an employé was injured by the slipping of a pinch bar on the rail while he was using it to move a locomotive. Such slipping occurred becaues the heel of the bar, where it came in contact with the rail, was too dull. The employé was experienced in the use of such tools. He knew the liability of the bar to slip if it was not kept sharp, yet he used it without first ascertaining its condition in that regard. In deciding the case, Mr. Justice Newman said, in effect, that the plaintiff knew the danger of using a defective bar and by reasonable attention he could have learned of its condition in that regard; and by inattention he took upon himself the risk of the defect, and therefore could not shift the consequences onto the defendant, but must bear the misfortune himself.

It is quite clear from the evidence that plaintiff paid no attention whatever to the ladder before using it. He said [411] that he tested it, but that such test was only to see that there was no flour under it. He also testified that if he had jumped the ladder down on the floor, and then tried to move it, he

could have detected at once whether there were points in the bottom or not; that what he did was to set the ladder up and give it a little jerk—simply picked it up and set it down; that he did not test it to see if there were points on the bottom; that if it were heavy he could have discovered whether there were such points by setting or striking it down on the floor. The evidence in the case is to the effect that the ladder was short, and weighed but twenty-five or thirty pounds. It it was defective, as claimed, the defect was open and obvious, with the exercise of the slightest attention; if it was negligence to furnish a ladder for use in and about the mill with such defects, then it was neglegence on plaintiff's part to use it without discovering a condition which was ascertainable by ordinary attention to the instrumentalities in use.

The principles applicable to this case are well established in the law of negligence, as shown by numerous authorities cited in Holt v. Chicago etc. Ry. Co., 94 Wis. 596. For such application to facts somewhat similar to these, Cahill v. Hilton, 106 N. Y. 512, cited by appellant's counsel, is a valuable precedent. As said there by Chief Justice Ruger, a ladder, like a spade or hoe, is an implement of simple structure, intelligible in all its parts to the dullest intellect. How strongly this applies to an experienced employé, required to use ladders constantly about his work, and who must be presumed to know as well as the master whether points in the bottoms of such tools are essential to their safety for use, and has better facilities than the master for discovering defects in that regard, is most manifest. On the undisputed facts here, the jury, as in Cahill v. Hilton, 106 N. Y. 512, were permitted to say that defendant was guilty of actionable negligence for not furnishing a ladder free from defects [412] in regard to points in the bottom, the absence of which would be quickly observed by ordinary observation and attention, yet that plaintiff, with superior means of observation and knowledge, was not guilty of contributory negligence because of his ignorance of such defects. That was a plain violation of one of the most familiar principles of the law of negligence.

In the discussion and decision of this case the rule has been kept clearly in mind that a servant is not obliged to search for defects in instrumentalities furnished for his use, but may rely on the duty of the master to see that they are reasonably safe; yet such rule does not militate at all against that other rule, just as well settled in the law of negligence, that the master may rely on the duty of the servant to observe all defects and dangers

which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work: Hazen v. West Superior Lumber Co., 91 Wis. 208; Soutar v. Minneapolis International Electric Co., 68 Minn. 18; Rietman v. Stolte, 120 Ind. 314; Ragon v. Toledo etc. Ry. Co., 97 Mich. 265; 37 Am. St. Rep. 336; Holt v. Chicago etc. Ry. Co., 94 Wis. 596.

The motion on the part of the defendant for the direction of a verdict should have been granted, and, failing in that, the verdict of the jury should have been set aside and a new trial granted for errors in the instruction and because the verdict was not warranted by the evidence.

By the Court. The judgment of the superior court is reversed, and the cause remanded for a new trial.

NEGLIGENCE—WHEN A QUESTION OF LAW, AND WHEN OF FACT.—If only one inference can be drawn from a given state of facts, then whether they constitute negligence is a question of law: Wade v. Columbia Electric Street Ry. etc. Co., 51 S. C. 296; 64 Am. St. Rep. 676, and note. The question of negligence is for the jury when the facts are in dispute, and also when they are indisputable, but intelligent and fair-minded men may reasonably differ as to the conclusions to be drawn therefrom: Watson v. Portland etc. Ry. Co., 91 Me. 584; 64 Am. St. Rep. 268, and note.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISKS.—A servant is bound to know, and assumes the risk of all defects in appliances about which he is employed that are open to observation or can be ascertained by the ordinary exercise of the senses: Taylor v. Wootan, 1 Ind. App. 188; 50 Am. St. Rep. 200, and note. If defects complained of are as open and obvious to the servant as they are to the master, the servant cannot recover for an injury arising therefrom: Louisville etc. R. R. Co. v. Stutts, 105 Ala. 368; 53 Am. St. Rep. 127, and note. See Victor Coal Co. v. Muir, 20 Colo. 320; 46 Am. St. Rep. 299; Meador v. Lake Shore etc. Ry. Co., 138 Ind. 290; 46 Am. St. Rep. 384, and notes.

ZILLEY *v.* DUNWIDDIE.

[98 WISCONSIN, 428.]

PARENT AND CHILD.—Presumptively it is a father's duty to support his child.

PARENT'S DUTY TO SUPPORT CHILD AFTER DIVORCE.—When a marriage is dissolved by divorce, the duty of each spouse respecting the support of their children is as before, where there is no decree of the court denying to either of them the custody of the children.

PARENTS—LIABILITY OF A FATHER TO A MOTHER OF A CHILD AFTER THEIR DIVORCE.—The liability of a hus-

band to his divorced wife in respect to the support of their children is the same as to any third person, unless modified by the decree of divorce. He may be liable to her for the maintenance of their children rendered while they live with her.

PARENT AND CHILD—FATHER'S LIABILITY TO HIS DIVORCED WIFE FOR THEIR CHILD RESIDING WITH HER. If a wife is granted a divorce from her husband because of his cruel and inhuman treatment of her, and given the custody of their child until it is ten years of age, and after that age is reached, the father requests the child to come to his home and there reside, but does not enforce the request, and the mother permits the child to remain with her, the father is answerable for the support and maintenance subsequently furnished to it by her.

Appeal from a judgment allowing the claim of Mary A. Zilley against the estate of her deceased husband for the support by her of their child. A divorce was decreed to the mother against the father because of his cruel and inhuman treatment of her, and she was awarded the custody of their child Clayton, then about five years of age, to be retained until he should become ten years of age, or until the further order of the court. This child reached ten years of age on July 9, 1889. The father then requested the mother to let the child come and live with him, which she refused, and he thereupon stated to her that he would not pay for the keeping of the child. He fixed up a room in his home and subsequently made frequent efforts to get the boy to live with him, but the mother did not consent, and the child continued to make his home with her. The child, however, visited his father on various occasions, but he preferred to reside with the mother. He returned to her and permanently resided with her, because the father did not compel him to reside elsewhere. In March, 1895, the father died, and the mother thereafter presented against his estate a claim for board and lodging of the child for five years and two months, amounting to ten hundred and seventy-two dollars and for clothing during that period aggregating one hundred and forty-six and a half dollars. This claim was disallowed by the county court to which it was presented, but on appeal to the circuit court the action of the county court was reversed, and the claim allowed. Hence the appeal to the supreme court.

B. F. Dunwiddie, guardian ad litem, for the appellant.

Ruger, Norcross & Ruger, for the respondent.

[432] PINNEY, J. At the common law, the husband was primarily liable for the support of his minor children: 2 Kent's Commentaries, 190. In McGoon v. Irvin, 1 Pin. 532, 44 Am. Dec. 409, it was said that "by every principle of law upon the

subject, recognized and strengthened by our statute, parents are under legal obligation to maintain and support their children who are of tender years and helpless." The statute (Rev. Stats. 1878, sec. 1503) makes the father primarily liable to support his minor children. When the marriage is dissolved by divorce, the duty of parents to maintain their children remains as before, for children are not parties to the divorce suit and do not lose any rights thereby. Hence the father's duty to maintain them after the divorce, where there is no decree of the court relating thereto, especially if their custody is not [433] taken from him, remains as before. After the parents were divorced all duties and obligations to each other ceased, and they became as strangers to each other: Nelson on Divorce and Separation, sec. 981. The claimant owed the husband no duty as wife, and her duty to support the child continued, as before, secondary, and his primary: 2 Bishop on Marriage, Divorce and Separation, sec. 1210; Plaster v. Plaster, 47 Ill. 292. It is generally laid down that the liability of the husband to a divorced wife, in respect to the support of the children, is the same as to any other third person, except as provided in the decree. If the court makes no order either for custody or support of children of the marriage, the divorce leaves the father's liability as at common law, and the mere divorce does not terminate his liability: 2 Bishop on Marriage, Divorce, and Separation, sec. 1220; Thomas v. Thomas, 41 Wis. 233. In a proper case it seems, after the marriage is dissolved he may be answerable to the mother for maintenance rendered the children while living with her: Stanton v. Willson, 3 Day, 37; 3 Am. Dec. 255; Buckminster v. Buckminster, 38 Vt. 248; 88 Am. Dec. 652. The father is under legal obligation to provide for the support of his children, even if they remain with their mother after her divorce, and, as against the public and the children, he cannot escape the duty: Courtright v. Courtright, 40 Mich. 633. Where the decree has granted the custody of the children to the wife and contains no provision for their support, it has been held that the father is not liable for the support of the children. But this is upon the ground that, the statute having made it the duty of the court to provide for their custody and maintenance upon divorce, it will be presumed that the decree has made all the provisions on that subject that were necessary; that the decree is conclusive as to the respective rights and obligations of the parties, subject to the right to have it modified as subsequent exigencies may require. As the decree makes the parties strangers as to each other, it is generally con-

sidered that a divorced husband is not liable [434] to his divorced wife for necessaries furnished a child of the marriage in her custody unless by agreement, express or implied; that there must be either an express promise, or facts from which one can reasonably be inferred: Ramsey v. Ramsey, 121 Ind. 215; Cushman v. Hassler, 82 Iowa, 295. And it has been considered that the support of the child, under such circumstances, by the mother, was but the voluntary performance of a natural duty, and that her remedy was to apply to the court for maintenance of the child when the divorce was granted. These, and other cases of a similar purport, are confidently relied on as decisive against the claimant.

In McGoon v. Irvin, 1 Pin. 532, 44 Am. Dec. 409, where the husband had procured a legislative divorce from his wife, and had left the minor children of the marriage in a family of a third person to be supported, the mother afterward obtained the custody of the children without his knowledge and consent, and refused, on demand made in behalf of the father, to give them up. She afterward intermarried with I., and the children were supported and educated by him. In an action by I. against the father to recover for their support, it was held that McG. had a legal right to the custody of the children, but, as he had not attempted to assert it against I., the law would presume that McG. had assented to their being in the control and custody of I.'s wife, their mother, and that I. could recover, though the act of the mother in obtaining the custody of the children before her second marriage might have been wrongful. And it was said by the court that "when a parent permits a stranger to maintain, support, and instruct such children, in no way objecting to the act, but rather assenting and advising therein, the law will presume that he knows his obligations, accepts the services, and assumes to pay." It was also said that "there was no duty or obligation on the plaintiff to notify the defendant to take the children away, or leave them to suffer until he could see [435] the defendant and make an express contract about their support and maintenance. Such a course would have merited the reprobation of every humane and upright man. The defendant had the legal right to the possession, and could have enforced it at any time. He should have first moved in the matter, and, on failure to do so, the law would presume that possession elsewhere was with his approbation and consent." In the leading case which holds the father liable, under circumstances like the present, the court approves the doctrine that, if a minor

is forced out into the world by the cruelty or improper conduct of the father, necessaries may be supplied, and the value thereof may be recovered from the parent. "There is evidently no satisfactory reason," said the court, "for changing the rule of liability, when, through ill-treatment or other breach of marital obligation, the husband renders it necessary for a court of justice to divorce the wife and commit to her the custody of her minor children. If, under such circumstances, upon the allowance of alimony with custody of children, the court omits to make an order for the children's maintenance, the father's natural obligation to support them is of none the less force. The duty of support is not evaded by the husband so conducting himself as to render it necessary to dissolve the bonds of matrimony and give to the mother the care and custody of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties, or to enable the father to convert his own misconduct into a shield against parental liability." But, obviously, this reasoning can only apply where the husband is at fault and the decree is silent as to his liability: Pretzinger v. Pretzinger, 45 Ohio St. 458; 4 Am. St. Rep. 542; approved in Bishop on Marriage, Divorce, and Separation, sec. 1223, and in Fulton v. Fulton, 52 Ohio St. 229; 49 Am. St. Rep. 720.

It is to be borne in mind that the divorce in the instant [436] case was granted to the claimant against her husband, August Zilley, on the ground of his cruel and inhuman treatment. It was his marital wrongdoing which led to the separation of the parties and the award of the custody of the boy, Clayton, to the mother until he became of the age of ten years. The case as to the subsequent support of the boy, Clayton A., may well be placed upon the ground that the improper conduct of the father had deprived the boy of his rightful and legitimate home, and so gave the right to the mother to supply the necessary support and maintenance, and that the father should be held liable as upon an implied contract, his primary liability still remaining in full force. It is said that the father is released from obligation to maintain his infant children when deprived of their society and services against his will. In Pretzinger v. Pretzinger, 45 Ohio St. 458, 4 Am. St. Rep. 542, it is answered: "If voluntary misconduct on his own part leads to the deprivation, he is himself responsible, and not the court which intervenes for the protection of his children; and if the father, as against a stranger, cannot escape liability for necessaries furnished to his minor

children, though remaining with their mother after the divorce, the mother will not be barred of an action against her former husband for the expense of maintaining them. After a dissolution of the marriage relation by divorce, the parties are henceforth single persons, to all intents and purposes. All marital duties and obligations to each other are at an end, and they become as strangers to each other. Upon the establishment of such new relations, a promise may be implied on the part of the father to pay the mother, as well as a third person, who has supplied the necessary wants of his infant child."

The case of Holt v. Holt, 42 Ark. 495, was one where there had been a decree of divorce giving the custody of infant children to the mother, and it was held that this would not relieve the father from his obligation to support them—that he was bound to maintain them as long as they were [437] too young to earn their own livelihood; and a court of chancery would, at a subsequent term, entertain the petition of the mother to recover from him her reasonable and proper advances for their support since the divorce, and for an order for their future support. The case of Stanton v. Willson, 3 Day, 37, 3 Am. Dec. 255, already cited, was relied on—"a decision," says Ellsworth, J., in Finch v. Finch, 22 Conn. 421, "well considered by a court of distinguished and unsurpassed ability, and which, as far as my knowledge extends, has ever been satisfactory to the judges and the profession, and sustained by principles as old as the common law itself."

It was the right, and the duty as well, of the husband to obtain the custody and control of his infant son, and to support him, after he had arrived at the age of ten years. We consider it against the policy of the law to encourage a father thus obligated to attempt to ignore or evade his parental duty, or to cast it upon any other party, so as to enable him to convert such parental neglect and misconduct into a shield against parental liability. Domestic and social duty alike required him, when his son arrived at the age of ten years, to enforce his parental rights and discharge his parental duties. He knew they were being exercised and performed by another, who as to him was then an utter stranger, and he knew, also, that the disrupted condition of his family relations had been adjudged in consequence of his marital misconduct. We think the case of Pretzinger v. Pretzinger, 45 Ohio St. 458, 4 Am. St. Rep. 542, and other similar cases, indicate the true rule, and that they are in accordance with sound principles of public policy. We think

there is ample ground from which the acquiescence and assent of the husband may be justly inferred to the provision made by the claimant for the necessary support and maintenance of his son, and which he had failed to furnish for him, so that a promise on his part to compensate the claimant for what she had so expended may be justly implied, as in the case of McGoon v. 438 Irvin, 1 Pin. 532; 44 Am. Dec. 409. The cases bearing upon the subject are not, it must be admitted, in entire accord, but they have turned largely upon questions of public policy in the states where they have been decided.

We hold, therefore, for the reasons stated, that the recovery in favor of the claimant is correct, and should be affirmed.

By the Court. The judgment of the circuit court is affirmed, with costs against the said appellant to be paid out of the estate of August Zilley, deceased.

JUDGE MARSHALL DISSENTED from the opinion of the court. He declared that the facts disclosed that the father, after he became entitled to the custody of the child, did all that parental affection could suggest to induce the child to live with him, stopping short only of the use of force or legal authority to accomplish that result, and that the judge was not able to discern with certainty the grounds upon which the opinion of the majority of the court rested. He insisted that a father could not be liable to another person for the support of a child when he gave no authority and entered into no contract for such support: Citing Mortimer v. Wright, 6 Mees. & W. 482; Sealborne v. Maddy, 38 Eng. Com. L. 194; Cushman v. Hassler, 82 Iowa, 295; Lapworth v. Leach, 79 Mich. 16; Ramsey v. Ramsey, 121 Ind. 215.

PARENT AND CHILD—DIVORCE OF PARENTS—LIABILITY OF FATHER FOR SUPPORT OF CHILD IN CUSTODY OF MOTHER.—After divorce a vinculo decreed a wife for her husband's desertion and failure to support, without provision for alimony or custody of the children, the husband is still liable for the necessary support of the children of the marriage during their minority: Gilley v. Gilley, 79 Me. 292; 1 Am. St. Rep. 307; and the fact that there has been such a decree of divorce on account of the husband's misconduct, with alimony and custody of the minor children to the wife, but with no provision for their support, will not, it is held by many courts, impair the obligation of the father to provide reasonably for their support until they are able to provide for themselves: Pretzinger v. Pretzinger, 45 Ohio St. 452; 4 Am. St. Rep. 542. As to this point, however, there is a marked conflict of authority, which is discussed in the monographic note to Hall v. Green, 47 Am. St. Rep. 314-317.

McCormick *v.* Cleveland.

[98 Wisconsin, 522.]

OFFICER DE FACTO—PRESUMPTION THAT PERSON ACTING AS A JUSTICE OF THE PEACE IS.—If a judgment is rendered by a person purporting to act as a justice of the peace, he will be presumed to have been in possession of the office and to be at least a justice de facto, and his judgment is not subject to collateral attack.

Sheridan & Evans, for the plaintiff in error.

Calkins & McGruer and Sol. P. Huntington, for the defendant in error.

523 MARSHALL, J. The record returned to this court discloses a judgment against the defendant [plaintiff in error], rendered before one William Hood, as justice of the peace of the city of Green Bay, an appeal in due form from such judgment to the circuit court for Brown county, and, as the result of the trial in the circuit court, a judgment for plaintiff [defendant in error] for eighty dollars damages and thirty-five dollars costs. There is no bill of exceptions, therefore the writ of error brings here, properly, only the judgment and the pleadings, verdict, orders, and papers on which it was based and which affect it: Donkle v. Milem, 88 Wis. 33. Affidavits, orders, and proceeding after judgment do not affect it, form no part of the record in the absence of a bill of exceptions making them such, and cannot be considered, though included in the return to the writ of error.

The sole question for discussion on the record, as we find it, is, Does it support the judgment? The ground upon which plaintiff in error contends it does not is that the case came to the circuit court by appeal from a judgment rendered by William Hood, pretending to act as justice of the peace of the city of Green Bay, but that the circuit court acquired no jurisdiction because Hood was not such justice, and was 524 not in possession of the office of justice of the peace of such city, therefore neither a de facto nor a de jure officer; that he was elected justice of the peace of the city of Ft. Howard, which ceased to exist as a corporation as a result of a vote on the question of its annexation to the city of Green Bay; that the charter of the city of Green Bay provides for three justices of the peace, and that there were duly elected and qualified justices in possession of all the offices at the time Hood pretended to act in the rendition of

the judgment in question; but such facts, if they exist, do not appear by the record.

If Hood was a de jure or a de facto justice of the peace, his jurisdiction for the purposes of this case was complete. There was such an office as justice of the peace of the city of Green Bay. The record shows that Hood rendered the judgment pretending to act as such justice. In the absence of evidence to the contrary, it must be presumed in favor of his acts that he was in the actual possession of the office, the duties of which he assumed the right to perform. Such facts constitute all the essentials of a de facto officer. Therefore, it conclusively appears, looking to the record alone, that Hood was at least a de facto officer, and hence his acts as such are not open to collateral attack: In re Boyle, 9 Wis. 264; Laver v. McGlachlin, 28 Wis. 364. This appears to be all that need be said in deciding this case. The question presented involves a proposition the decision of which turns on a principle so elementary that any discussion of the subject appears to be unnecessary.

By the Court. Judgment affirmed.

OFFICERS DE FACTO—JUDGMENTS BY—COLLATERAL ATTACK.—The judgment of a judge de facto is valid: State v. Carroll, 38 Conn. 449; 9 Am. Rep. 409. The acts of de facto officers are valid and binding as to the public and third persons: See monographic note to Hildreth v. McIntire, 19 Am. Dec. 68. This rule is based on justice, necessity, and public policy, and is intended chiefly for the protection of an innocent public who may be ignorant of the officer's defect of official title: Extended note to Smith v. Bondurant, 58 Am. Rep. 443. The validity of such acts cannot be collaterally attacked: Cleveland v. McCanna, 7 N. Dak. 455; 66 Am. St. Rep. 670, and note.

JUSTICES OF THE PEACE—JUDGMENTS OF—PRESUMPTIONS.—Ordinarily, nothing is presumed in favor of the jurisdiction of a justice of the peace; it must be affirmatively shown; Note to Hambel v. Davis, 59 Am. St. Rep. 48. But as to this, the cases are not in agreement, and judgments of justices of the peace are supported by various presumptions when collaterally attacked: Leonard v. Sparks, 117 Mo. 103; 38 Am. St. Rep. 646; Turner v. Conkey, 132 Ind. 248; 32 Am. St. Rep. 251; Wilkerson v. Schoonmaker, 77 Tex. 615; 19 Am. St. Rep. 803, and notes.

CRAWFORD *v.* STATE.

[98 WISCONSIN, 623.]

HUSBAND AND WIFE AS WITNESSES.—IN A PROSECUTION FOR ADULTERY a wife is not permitted to testify against her husband.

D. T. Phelan and Simon Gillen, for the plaintiff in error.

No brief on file for the defendant in error.

623 CASSODAY, C. J. The plaintiff in error was tried and convicted of the crime of adultery, and sentenced to imprisonment 624 in the state prison for the term of two years, and to reverse that judgment he sues out this writ of error.

Upon the trial his wife was admitted as a witness in behalf of the state, and allowed to testify. This was manifest error. It is well settled that "neither husband nor wife can be a witness at common law for or against the other in prosecutions" for adultery: 2 Wharton's Criminal Law, 10th ed., sec. 1736; 1 Greenleaf on Evidence, sec. 334; 3 Jones on Evidence, sec. 751; Mills v. United States, 1 Pin. 73; Schoeffler v. State, 3 Wis. 823, 844. "With certain exceptions, it was, at common law, against public policy to allow the wife to be a witness for or against her husband in any action, civil or criminal, to which she was not a party": Smith v. Merrill, 75 Wis. 462. The case at bar does not come within any exception. Nor is there any statute in this state making the wife a competent witness against the husband in such a case. Certainly section 4072 of the Revised Statutes of 1878 does not: See Farrell v. Ledwell, 21 Wis. 182; Carney v. Gleissner, 58 Wis. 674; Selden v. State, 74 Wis. 271; 17 Am. St. Rep. 144; Smith v. Merrill, 75 Wis. 461; Horner v. Yance, 93 Wis. 352; Lanctot v. State, 98 Wis. 136; ante, p. 800.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

WITNESSES—COMPETENCY IN PROSECUTION FOR ADULTERY—HUSBAND AND WIFE.—A husband, though divorced from his wife, is not a competent witness to testify to her alleged adultery occurring during the marriage: Hanselman v. Dovel, 102 Mich. 505; 47 Am. St. Rep. 557, and note. It is said that the rule that a wife may not testify against her husband is founded upon their legal unity, and is inapplicable to actions in which the husband and wife have conflicting interests, such as divorce suits, actions by the wife seeking protection against the husband, or equitable actions relating to the wife's separate estate: Extended note to De Farges v. Ryland, 24 Am. St. Rep. 663, 664. In some states, statutes enacting that "the wife or husband shall in no case be a witness for or against the

other, except in criminal proceedings for a crime committed by one against the other," are construed as rendering the husband competent on the trial of his wife for adultery: Extended note to State v. Boyd, 27 Am. Dec. 379; and vice versa; Roland v. State, 9 Tex. Ct. App. 277; 35 Am. Rep. 743, and note. On the general subject see monographic note to Hitchcock v. Moore, 14 Am. St. Rep. 481.

COOK *v.* MINNEAPOLIS, ST. PAUL & SAULT ST. MARIE RAILWAY COMPANY.

[98 WISCONSIN, 624.]

NEGLIGENCE—PROXIMATE CAUSE—TWO FIRES DUE TO DIFFERENT AGENCIES BUT UNITING AS ONE AND THEN DOING INJURY.—If two fires are started, one due to the defendant's negligence and the other to some unknown cause, and they unite, so that the identity of both as independent agencies is lost before the property of the plaintiff is reached, but on reaching it, the fire as then united does injury, but the injury would have been the same from either fire had it not met and joined the other, no recovery can be had for the injuries thus inflicted.

WHERE AN INJURY ACCRUES TO A PERSON BY THE CONCURRENCE OF TWO CAUSES, one traceable to another person under such circumstances as to render him liable as a wrongdoer, and the other not traceable to any responsible origin, but of such efficient and superior force that it would have produced the injury regardless of the responsible cause, there is no legal liability, because no damage can, in such event, be traced with reasonable certainty to the wrongdoer as a producing cause.

RAILWAYS—FAILURE TO FENCE TRACK—INJURY, WHEN NOT DUE TO.—If a statute imposes on a railway corporation the duty of fencing its track, and declares that until this duty is performed, it shall be liable for all injuries to animals occasioned by the want of such fence, and animals enter upon the track, which had never been fenced, and are killed, the corporation is not liable therefor, if, though the track had been fenced, the fence must have been destroyed by a fire immediately preceding such entry, this fire being the cause of the turning of the animals out of their stable and their going upon the track.

COSTS OF APPEAL.—Where an appellant prints several briefs and an unnecessarily voluminous transcript, his costs will ordinarily be restricted to the printing of one brief and to so much only of the transcript as is necessary for the proper presentation of his case.

Action to recover: 1. For the destruction of a lumber camp and several buildings and the camp equipage and appliances used therewith of the alleged value of fifty-eight thousand dollars; 2. For the loss of two horses killed by the defendant's engines, they having strayed upon the right of way, because it was not fenced; 3. For the killing of a horse on the same track; 4. For the killing of a cow thereon. The injury to the lumber camp

and its appliances and the killing of the two horses occurred on the 20th of May, 1893, the other injuries at dates prior thereto. The right of the plaintiffs to recover for these latter injuries was admitted, and the only questions involved in the appeal related to their right to recover for the damages suffered on the 20th of May, 1893. On that day a fire was started by a locomotive belonging to the defendant, and spread toward the property of the plaintiffs until it met and united with another fire, the origin of which was unknown. The two fires then blended, became one, and reached and destroyed the plaintiffs' property. For the purpose of permitting them to escape destruction the horses of the plaintiffs were turned out of the stable, which was about to be consumed by fire, and soon afterward strayed upon the unfenced track and were killed. The jury was instructed that if the fire set by the defendant's engine was attributable to its negligence and was the sole cause of the destruction of the plaintiffs' property, they were entitled to recover the damage suffered therefrom; that if the negligence of the defendant contributed to the fires, and there were other fires which also contributed to the damage sustained, and the jury could determine what amount of the damage resulted from the fire attributed to the defendant's negligence, they might do so. The jury, by a special verdict found: 1. That the defendant's engine started a fire on its right of way; 2. That the fire spread to the plaintiffs' camp and property, and set fire thereto; 3. That there was another fire coming from another direction at the same time, and was driven into the plaintiffs' yard and camp, setting them on fire; 4. That these two fires united before reaching the cedar camp; 5. That the defendant's engine was properly constructed and in good condition; 6. That the defendant was guilty of negligence on account of the condition of its right of way, causing and contributing to the starting of the fire; 7. That there was want of ordinary care upon the part of the defendant consisting in not keeping its right of way reasonably clear of combustible material; and 8. That plaintiffs' damage caused by the fire was fifty per cent of their claim, less insurance, amounting to twenty-six thousand one hundred and eighty-two dollars and ninety-three cents. The court construed the verdict of the jury as apportioning the loss by fire equally between the fire due to the defendant and to that of unknown origin, and held that the defendant was responsible for the entire damage, and ordered judgment entered for the value of the entire property destroyed. The defendant appealed.

Alfred H. Bright and Greene, Vroman & Fairchild, for the appellant.

Webster & Classon, for the respondents.

633 MARSHALL, J. The foregoing brief statement is believed to present clearly the only questions necessary to be considered in determining this appeal. Numerous questions were suggested and errors assigned and exhaustively and ably discussed in the numerous briefs of eminent counsel who represent the parties in this court, most of which questions and alleged errors, in what is deemed to be an orderly consideration of the cause, are not necessarily reached in 634 arriving at a final conclusion as to the rights of the parties. That will appear from what follows, and is the reason why such questions have not been considered or decided. No further proceedings in this case will involve them, and they are not of such a character that a decision of them would be important to trial courts in the future. This is said as to the greater part of the field covered by the case and briefs of counsel, not by way of criticism, for it is reasonable and commendable that, at least where so large a sum of money as the judgment here calls for is involved, all questions deemed by counsel in any way liable to affect the final result in any view of the case be suggested to the court; yet, where no trial follows the result here, the questions necessary to a determination of the appeal are all that it is profitable to discuss, unless others are of special importance as future guides.

The controlling question on the record, as we view it, is, What was the proper judgment on the first cause of action according to the undisputed facts and the facts found by the jury? The respondents stand on the findings of the jury as verities, and must prevail, if at all, on the case as thus determined. On the various motions made by the parties the court was called upon, if the verdict stood the test of the motion to set it aside as contrary to the evidence and for other reasons, to order judgment for appellant or respondents, according to the determination reached on the questions of law which they presented. Such questions were determined in respondents' favor. The principles they involved will clearly appear to be of far-reaching importance by a brief reference to the facts.

The jury found that the southwest fire, alleged to have been caused by defendant's negligence, and to have originated about one mile and a quarter southwest of the property destroyed, did not reach such property so as to affect it as an independent

agency; that another fire came from the [635] northwest; and so united with the other that the identity of both as independent agencies was lost before any fire reached such property; that when the northwest fire reached the line of the southwest fire, so there was in fact but one fire, it swept on into the yard, and set plaintiff's property on fire and destroyed it. While the jury found that both fires caused the burning, as they said that but on fire entered the yard and that swept into it from the northwest, the direction from which the independent fire of unknown origin came, it is hard to perceive how the fact can be that the southwest fire, as an efficient agent, ever reached the scene of the destruction. But, looking at the verdict in the most favorable view for the respondents, and giving it the most favorable construction it will reasonably bear, it is to the effect that the damage was done solely by one fire; that such fire was made up of two independent fires which united before the property was reached, one for which defendant was responsible, and the other having no known responsible origin, so that if the responsible agent had not existed at all the loss would have been the same in all respects, as to time, manner, and extent. We are strongly persuaded from the evidence that the finding of the jury that the southwest fire, as an efficient agent, reached the plaintiff's property, either by union with the northwest fire or otherwise, is contrary to undisputed facts and all reasonable probabilities; but that is one of the questions not necessary to decide, if, taking the verdict as it stands, defendant is not liable.

That we correctly construe the verdict of the jury cannot be reasonably questioned. The trial judge, in a very elaborate opinion, delivered in disposing of the motions for judgment, gave it the same construction. He said: "Each fire reached the yard only as part of one common fire, and either in the absence of the other would have reached and fired the yard the same as the joint fire did. In that sense both reached the yard at the same time, although they united [636] some distance away from it. Under the law governing the case it is immaterial how far away they united." And again: "We reach the conclusion that neither was the proximate cause of the injury, because the event would have occurred without either cause—the other cause existed—each was concededly a cause sufficient to produce the injury. The injury was produced by the concurrent action of both, but neither was the proximate cause, because the other, without it, would have produced the same result." The logic of the learned circuit judge, as to the proximate cause, would

hardly bear the test of careful analysis. It may be to take his language literally would not convey the real meaning intended. Where two causes concur in producing a certain result, either of which would produce the same result regardless of the other, it is not an accurate statement of the situation to say that neither is the proximate cause of such result, using the term as we apprehend the learned judge did, as descriptive of the antecedent or producing cause, and not in the strict legal sense of a cause referable to human agency on a line of responsible causation. In the mere physical sense of producing antecedent, it is more proper to say that, in the circumstances suggested, neither fire was the sole proximate cause of the loss.

From what has preceded it is apparent that the legal question presented to the trial court and decided in plaintiffs' favor, in granting their motion for judgment and denying that of the defendant, is the following: Where two independent efficient causes unite and produce an injury to another, one of which is traceable to a responsible person whose negligence set it in motion under such circumstances that he is chargeable with knowledge that it might cause an injury to another as a natural and probable result of his conduct, and the other cause is not traceable to any known responsible agent, each of which causes, however, without the concurrence of the other, would produce the same injury, [637] that is, so that the injury would happen at the same time and to the same extent regardless of the responsible agency, does a cause of action against such agency accrue to the injured person for his loss? It is believed that the solution of that question is governed by principles as old as the common law—principles so long and firmly established, and universally recognized by all textwriters and courts, that were it not for the learned discussion of the subject by the trial court, leading up to the conclusion which eventuated in the judgment appealed from, and the later learned discussion by counsel in this court to support the conclusion thus reached, the decision here would be supported by a mere statement of the law without extended discussion or citation of authorities; but such circumstances seem to furnish excuse, at least, for a somewhat different course.

It seems to have been conceded on the trial below, at one stage of the proceedings, that unless the alleged negligent fire was the sole cause of the loss complained of, there could be no recovery therefor. Later, in the submission of the case to the jury, it appears to have been uncertain in the judicial mind,

whether, if the defendant was liable at all, the liability extended to the entire loss, or only to a portion of it, on the theory that there might be an apportionment of the loss between the concurring causes. But it was finally determined that the person charged, known to have negligently originated one of the causes, was, as a matter of law, liable for the entire loss, though it would have happened just the same from the other efficient cause of unknown origin. To support that theory numerous cases are cited to the effect that when two or more concurring causes produce a loss, each having a responsible source, there is a joint and several liability for the entire loss. That is a doctrine too familiar to require more than to be stated. When the facts are such as to invoke its application, it extends to where each of the concurring causes contributes to produce [638] the result and is necessary to it, and where each is sufficient of itself to produce the result and would, in the given case, have that effect regardless of the other, and whether the concurrence of the causes be intentional or accidental.

In Haley v. Jump River Lumber Co., 81 Wis. 412, a person, on one theory of the case, was injured by negligence of a coemployé in loading a car, concurring with negligence of the defendant in leaving an obstruction in dangerous proximity to the track. Under such circumstances, the court said that each was liable for the injury. In the same line is Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 50 Am. Rep. 352, where negligence of a millowner in allowing shavings and sawdust to accumulate between his mill and a dock, concurred with negligence of the defendant in allowing sparks to be emitted from the smokestack of its boat, whereby a fire was set which spread to plaintiff's property and destroyed it. The court held the defendant liable, and Mr. Justice Taylor, who wrote the opinion, cited in support of it, among numerous authorities, the elementary rule laid down in Wharton on Negligence at section 144, in substance as follows: The fact that one responsible person contributes, either before the interposition of another or concurrently with such interposition, in producing the damage, is no defense as to either. If A negligently leaves certain articles in a particular place, and B negligentl y meddles with them, supposing B's negligence to be made out and he is a responsible party under the limitation expressed, he cannot set up A's prior negligence as a defense. Another example is Johnson v. Northwestern Tel. etc. Co., 48 Minn. 433, where a weak telephone pole was negligently left in place by the company. For a limited

time an adjoining lotowner allowed the company to reinforce the ability of the pole to stand by guying it to his building with a wire. After a reasonable time had elapsed in which to replace the defective pole with a suitable one, the property owner cut the guy wire and the result was [639] that the pole fell and injured the plaintiff. On one theory of the case the property owner and the telephone company were both negligent, and without the concurring negligence the injury would not have happened. Under these circumstances the court said that each was liable for the whole loss.

On another branch of the rule mentioned, as an example of numerous authorities that might be cited, is Gould v. Schermer, 101 Iowa, 582, where, on one theory of the case, defendant's negligence concurred with some other cause, not attributable to any responsible human agency, to produce the injury, and the court said, in effect, that the defendant's wrong, concurring with the other cause, and both operating proximately at the same time in producing the injury, makes the wrongdoer liable therefor. That was on the theory that the accident would not have occurred but for the negligent act.

On another branch of the rule stated may be cited Slater v. Mersereau, 64 N. Y. 138, where there were two efficient proximate causes, each traceable to the negligence of a responsible party, either of which would have caused the entire injury regardless of the existence of the other, and the court, by Miller, J., said in substance: It is no defense for a person against whom negligence which causes damage is established, to prove that without fault on his part the same damage would have resulted from the negligent act of the other, but each is responsible for the entire damage.

Further citation of authority along this line is deemed unnecessary. It will be easily observed that they refer: 1. To cases where there was a concurrence of responsible human agencies, both of which were essential to the result; 2. To cases where there was a concurrence of responsible human agencies, either of which would have effected the result regardless of the other; 3. To cases where there was a concurrence of a responsible human agency and some other cause, and the former was an efficient contributing cause [640] and essential to the result. All of the numerous cases cited by respondents' counsel, and those cited by the learned circuit judge, fall within one or the other of the situations mentioned, as, for example, McClellan v. St. Paul etc. Ry. Co., 58 Minn. 104, much relied on to support the

judgment, where the recovery was solely on the ground that, though there was proof of two fires, the finding of the jury was that the fire negligently originated by defendant was the one that reached the plaintiffs' property and the sole cause of its destruction. In discussing an assignment of error on the charge given by the trial court, the judge who delivered the opinion said: "If two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of the parties can be held responsible for the resulting damages, in case the fires mingle." That language was wholly unnecessary to a decision of the case, as no such situation was presented, and, unless read in the light of well-understood legal principles and the circumstances which were evidently in the judicial mind, it would be very liable to mislead. In the view that the judge was speaking of the existence and concurrence of two fires, both attributable to the negligence of responsible agencies, so as to bring the case within the rule of joint wrongdoers, the language ceases to have any significance in support of the theory upon which this judgment was rendered and must stand, if at all. That the rule of joint tort feasors was what the court referred to, is plain from what was subsequently said by way of illustration, to the effect that, where the injury is the result of two concurrent causes, one party is not exempt from full liability although another is equally culpable. To say that the learned court intended to extend that rule to cases where the act of the wrongdoer concurs with some unknown cause not attributable to any responsible human agency, and causes damage, thereby rendering the legal consequences to the wrongdoer the same as in the case of joint [641] wrongdoers, whether his act was essential to the result or not, would be a conclusion not warranted by a careful reading of the whole opinion, and inconsistent with the settled rule of law on the subject, recognized by that court and all others, as we shall see later.

What has been said above applies to Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700; Stone v. Dickinson, 5 Allen, 29; 81 Am. Dec. 727; 7 Allen, 26; Stetler v. Chicago etc. Ry. Co., 46 Wis. 497, and the numerous other cases cited by respondents. All are cases of joint tort feasors, or cases where the injury would not have happened but for the negligence complained of. They do not touch the real question we are called upon to decide. What is the situation of the wrongdoer where the injury would have taken place, necessarily, from another cause, at the same time and to the same extent, regardless of his conduct?

That is the question presented. The discussion thus far has proceeded on a line merely to clearly bring out and recognize the well-known principles of law for which respondents contend and which ruled the trial court, and show their inapplicability to the facts found by the jury.

The law of negligence is laid on reasonable lines the same as any other branch of jurisprudence. The theory upon which compensation goes to an injured person from another whose negligence proximately caused the injury is not that of punishment for the wrong, but that, in justice to such person, compensation is due for the damages caused to him by such negligence, so far as the same can be reasonably ascertained. Where the wrong of one person concurs with that of another under such circumstances that the injury would not result without the concurrence, it is reasonable to hold each liable for the entire loss, because the same would not have occurred if the negligence of either were absent. Notwithstanding the concurrence of the two causes, each, in a sense, under such circumstances, is the proximate cause of the loss, because there is responsible human causation back [642] of it, without which the injury would not have happened. Again, where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, it is reasonable to say that there is a joint and several liability, because, whether the concurrence be intentional, actual or constructive, each wrongdoer, in effect, adopts the conduct of his coactor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety. But where a cause set in motion by negligence reaches to the result complained of in a line of responsible causation, aand another cause, having no responsible origin, reaches it at the same time, so that what then takes place would happen as the effect of either cause, entirely regardless of the other, then the consequence cannot be said, with any degree of certainty, to relate to negligence as its antecedent; requisite intelligent causation necessary to legal liability is wanting, leaving no ground, in reason or in law, for it to rest upon.

To further illustrate: If an injury accrues to a person from inability to control his team, where that is more than momentary, concurring with a defect in the highway, and the injury would not otherwise happen, the mere concurrence of negligence

of the municipality responsible for the defect will not render the corporation liable, because the condition of the team is deemed to be the real producing cause: Jackson v. Bellevieu, 30 Wis. 250; Houfe v. Fulton, 29 Wis. 296; 9 Am. Rep. 568; Schillinger v. Verona, 96 Wis. 456; Loberg v. Amherst, 87 Wis. 634; 41 Am. St. Rep. 69; McFarlane v. Sullivan, 99 Wis. 361; Scannal v. Cambridge, 163 Mass. 91; Babson v. Rockport, 101 Mass. 93; Palmer v. Andover, 2 Cush. 600.

Applying the same doctrine in Campbell v. Stillwater, 32 Minn. 308, 50 Am. Rep. 567, the court held that where several concurring acts [643] or conditions of things, one of them a wrongful act or omission of some person, under such circumstances that such person might reasonably have anticipated such an injury as the natural and probable result of his act or omission, he is liable, provided the injury would not have occurred without it. The general rule, so recognized and applied by that court, was stated by the judge who wrote the opinion, thus: "In case of tort, the rule as to the proximate cause is, that where several acts or conditions of things produce an injury, if one is the wrongful act or omission of the defendant and it would not have occurred without his act, and he might reasonably have anticipated the result as a natural consequence of such act, that is the proximate cause of the result." That is quite inconsistent with the construction of the opinion of the same court in McClellan v. St. Paul etc. Ry. Co., 58 Minn. 104, confidently pressed upon our attention, but accords with the construction which we have given to it and which was clearly what the court intended, though, as before indicated, the language was used that might lead to a different conclusion unless viewed in the light of settled legal principles. It may safely be said that the rule stated in Campbell v. Stillwater, 32 Minn. 308, 50 Am. Rep. 568, applies in all cases where negligence of a party concurs with some other cause not traceable to a responsible source: 16 Am. & Eng. Ency. of Law, 441, and notes; 2 Thompson on Negligence, 1085; Shearman and Redfield on Negligence, sec. 33; Whittaker's Smith on Negligence, 2d Am. ed., 44; Ring v. Cohoes, 77 N. Y. 83; 33 Am. Rep. 574; Ayres v. Hammondsport, 130 N. Y. 665; Ilfrey v. Sabine etc. Ry. Co., 76 Tex. 63; Union Street Ry. Co. v. Stone, 54 Kan. 83; Carterville v. Cook, 129 Ill. 152; 16 Am. St. Rep. 248.

The logical deduction from the foregoing is, that where an injury accrues to a person, by the concurrence of two causes, one traceable to another person under such circumstances as to ren-

der him liable as a wrongdoer, and the other not traceable to any responsible origin, but of such efficient or superior force that it would produce the injury regardless of [644] the responsible cause, there is no legal liability. No damage in such circumstances can be traced, with reasonable certainty, to wrongdoing as a producing cause. The one traceable to the wrongdoer is superseded by the other cause or condition, which takes the place of it and becomes, in a physical sense, the proximate antecedent of what follows.

From the foregoing the conclusion is easily reached that the defendant in this case is not liable for the fire loss from the facts found by the jury. Its negligence, even if operating up to about the instant the fire entered the plaintiffs' property, was there superseded by the independent northwest fire. Whether it can be said that after the two fires became one the element attributable to the defendant continued, though its identity was lost in the combination and it was superseded by the fire that swept down upon the property from the northwest, it cannot be said that the result which followed would not have occurred but for such responsible element. On the contrary, it stands as a verity in the case that it would have occurred just the same, regardless of the negligent fire.

It is proper to say that the learned counsel for the plaintiffs tried the case and asked its submission to the jury with a very clear conception of the legal principles governing it, in perfect accord with the conclusion which we have reached. They did not seek or expect to recover upon any other theory than that the destruction of plaintiffs' property was caused by the southwest fire, and that it would not otherwise have occurred at that time. One of the counsel said, in substance, during a colloquy between him and the court, when the questions for submission to the jury were being settled: We must stand or fall on the theory that the southwest fire spread to plaintiffs' property and destroyed it, and that no fire came from the northwest and reached the property; that if the whole loss can as well be attributed to the northwest fire as to the southwest fire, no assessment of [645] damages can be made against the defendant. The whole difficulty arose when, after the verdict was rendered, the doctrine of the liability of joint wrongdoers, or of a wrongdoer when his act, concurring with some other cause or condition having no responsible origin, produces an injury which would not otherwise occur, was applied to the verdict, unmindful, apparently, that such verdict did not present facts warrant-

ing such application, but, on the contrary, presented facts which brought the case within a different rule in the law of negligence.

There is left the claim for the two horses, killed on the day of the fire by straying upon the right of way and being run down by one of defendant's engines. It is not claimed that there was any negligence of the employés in charge of the train that killed the horses. The right of recovery is based solely upon the fact that defendant failed to perform its duty in respect to fencing the right of way. The statute on the subject (Rev. Stats. 1878, sec. 1810) requires railroad corporations to fence their tracks, and provides that until such duty is performed, every such corporation, and every railroad corporation owning any such road, shall be liable for all damages done to cattle, horses, or other domestic animals, occasioned in any manner, in whole or in part, by the want of such fence. If the horses, therefore, entered upon the right of way because of the failure of the defendant to comply with the statute then the rule of absolute liability attached: Quackenbush v. Wisconsin etc. R. R. Co., 62 Wis. 411. There is no finding on the question of whether the entry of the horses on the right of way is attributable in whole or in part to the failure to fence it. It must be conceded that, had there been a fence, it would necessarily have been destroyed by the fire that occurred two or three hours before the horses were killed. The evidence all points that way. They were turned out of their stable and left to run at large to preserve them from the fire that destroyed substantially [646] everything of a combustible character on both sides of the railway track in the vicinity of the place where they entered upon the right of way.

The statute is in derogation of the common law. It is a penal statute. The validity of it rests wholly upon the police powers of the government, and it should be construed with reasonable strictness so as not to go beyond its plain letter and spirit. That is a general rule of construction applicable to all statutes of its class: Stone v. Lannon, 6 Wis. 497; Coleman v. Hart, 37 Wis. 180; State v. Huck, 29 Wis. 202; Crumbly v. Bardon, 70 Wis. 385. Looking at the language in the light of such rule, it must be held that the circumstances of the horses going upon the track must have some causal connection with the failure to fence, not the mere nonexistence of a fence at the time of the entry, or there is no liability because of the failure to fence. If the failure to fence did not reach to such entry because of the intervention of some other cause or condition, the statutory rule of absolute liability does not apply. That has been held in

cases where horses were abandoned under such circumstances that it was certain they would go upon the right of way where they would be liable to be killed: Corwin v. New York etc. R. R. Co., 13 N. Y. 42; Missouri Pac. Ry. Co. v. Roads, 33 Kan. 640; Welty v. Indianapolis etc. R. R. Co., 105 Ind. 55. In such circumstances it was held that the owner of the horses consented to their destruction; that his conduct was not mere contributory negligence, which would not be a defense under the statute, but was the sole proximate cause.

That the law-makers intended that the failure to fence should be at least a contributing cause to the entry of domestic animals upon the railway right of way in order to make the rule of absolute liability applicable is quite clear, not only from their language, but from its being followed by a provision to the effect that in case of a failure to maintain [647] a fence after once constructed, the liability for the killing of domestic animals shall not extend to losses accruing in part from contributory negligence of the persons claiming compensation therefor, or losses accruing from defects in the fence existing without negligence on the part of the railway corporation. Here there was a superseding overpowering cause that intervened between the failure of duty to fence and the entry of the horses upon the right of way, which took the place of the defendant's negligence, so that it cannot reasonably be said that such negligence, either in whole or in part, produced the loss complained of. In following the chain of causation from the death of the horses back, we find it tied at the antecedent end to the condition created by the fire. Over that we cannot pass to reach the neglect to fence, which, under the circumstances, became a remote cause. Our duty ends when we trace the chain back to what must stand as a real producing cause: Causa proxima et non remota spectatur. The rule clearly applies that if, between an injury and prior negligence which might have produced it had the effect reached that far, there was a superseding cause, though not traceable to a responsible source, which, without the operation of the negligence contributing, produced the result complained of, the wrongdoer is not liable.

It follows necessarily from the preceding, that the trial court erred in holding that the defendant was liable for the loss of the two horses killed on the day of the fire. There was no contest as to the right to recover three hundred and sixty dollars and ninety-four cents under the third and fourth causes of action. Judgment in plaintiff's favor should have been limited to that,

and costs taxed according to law. The judgment should have been otherwise in favor of the defendant. There is a statement in the motion papers indicating that there was an offer of judgment in the case made September 21, 1894. We are unable to find anything in the record indicating the nature of that offer, so [648] as to determine how it legally affects the question of costs in the lower court; therefore no directions in regard to it can be made. The question of costs will therefore be left for such court to determine when the case again reaches it.

A careful examination of the printed case and briefs satisfies us that a strict compliance with the rules calls for much less printing than they contain. The case consists of five hundred and forty-seven pages, much of which could have been omitted entirely, and the balance have been much condensed. There are four briefs, including a reply, consisting in the aggregate of a little less than two hundred pages. The rules require but one brief, and permit, in addition, a reply. Where there are several counsel on the same side and they deem the interests of their client to require a division of labor and separate briefs to be filed, that is permissible; but the fact remains that only one brief on a side is called for by the rules, though disbursements for others, permitted in proper cases, may be allowed. The allowance ordinarily, as a matter of right, however, goes only for one brief on a side and the permitted reply, as it is only necessary printing that is taxable against the losing party: Paine v. Trumbull, 33 Wis. 164. It is considered that three hundred pages would have covered all printing that was reasonably necessary on this appeal, on the part of the appellant; therefore disbursements in this court on that account must be limited to that amount of printing.

By the Court. The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment in favor of the plaintiffs for three hundred and sixty dollars and ninety-four cents, and in favor of the defendant as to the first and second causes of action in the complaint, costs in the lower court to be taxed and allowed according to law; costs for printing on this appeal to be taxed as indicated in the opinion.

NEGLIGENCE — LIABILITY FOR — PROXIMATE CAUSE.— There can be no recovery for negligence unless the injury complained of was the natural and probable result of it, and the attendant circumstances were such that a person of ordinary care ought reasonably to have apprehended that the injury might result from the negligence: Maitland v. Gilbert Paper Co., 97 Wis. 476; 65 Am. St. Rep. 137. If injury is attributable to two causes, both

proximate, one the result of negligence and the other not, and the injury would not have occurred but for the negligent act, the party guilty of the negligent act is liable: Reid v. Evansville etc. R. R. Co., 10 Ind. App. 385; 53 Am. St. Rep. 391. The test as to a causal connection between the negligence and the injury complained of is whether the wrongful act must have been the causa sine qua non of the injury, a cause without the existence of which the injury would not have been suffered: See monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 815. The principal case affords an excellent example of the difficulties which questions of proximate cause may raise. In deciding it, the court adhered to the general rule that if a breach of a statute is relied upon by the plaintiff as a cause of action he must show that the breach of the statute is the proximate cause: See monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 817.

COSTS ON APPEAL—ALLOWANCE OF.—The expense of printing papers to be used on any hearing, when required by a rule of court, is properly allowed as costs, but it is otherwise as it respects charges for useless and prolix matters in such papers. The expenses of printing and copying briefs are not to be included: See monographic note to Ela v. Knox, 88 Am. Dec. 184. See Schneitman v. Noble, 75 Iowa, 120; 9 Am. St. Rep. 467; Zigler v. Menges, 121 Ind. 99; 16 Am. St. Rep. 357.

ZEHREN *v.* MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

[99 WISCONSIN, 83.]

HIGHWAY, PUBLIC, GRADE, RIGHT TO CHANGE.—The authorities of a town have no right to change the grade of a suburban public highway so as to cut off or prejudicially interfere with the right of access thereto of an adjacent property owner, when such change is made at the request and for the sole benefit of a street railway company.

HIGHWAYS, PUBLIC, ADDITIONAL BURDENS.—An interurban electric railway running upon a public highway through a country town is an additional burden thereon, to which the owner of adjacent property is not obliged to submit without compensation.

HIGHWAYS, PUBLIC, PROPERTY OWNER'S RIGHT TO OBJECT TO ADDITIONAL BURDENS UPON AND CHANGES IN THE GRADE OF.—An electric street railway corporation has no right to construct and operate its road upon a public highway adjacent to a city or to change the grade thereof as against the objection of an owner of abutting property, nor can such right be granted to it by town authorities, unless it first makes compensation to such property owner.

Suit to enjoin the defendant corporation from grading down a highway in front of the complainant's premises and from constructing and operating an electric street railway thereon. A temporary injunction was granted. This the defendant moved to vacate, and the motion having been denied, appealed.

Miller, Noyes, Miller & Wahl, for the appellant.

O'Connor, Hammel & Schmitz, for the respondents.

87 WINSLOW, J. The defendant proposes to construct and operate an electric street railway for the carriage of passengers upon a highway in a country town outside of the city limits of Milwaukee, and, for that purpose and by permission of the town authorities, to cut down the highway about eight feet, so that an abutting owner's right of access to his property will be seriously impaired; and the question is, whether this can be done without the consent of the abutting owner, and without the payment of compensation to such owner.

The question is a new one in this court, and one the importance of which, in view of the rapid development of electric power as a means of carriage for long distances, can hardly be overestimated. If the highway in question in this case can be so used, the question at once arises whether every country highway may not be used in the same way. If it be said that the highway before us in this case is in effect a city street because of its close proximity to the city, and because the adjoining lands are platted, and because it connects a suburban village with the city, and that a clear distinction ought to be drawn between such a highway and the ordinary country road in farming districts, the inquiry will then be, Can such a distinction be practically drawn, and can it be satisfactorily applied, and upon what solid 88 grounds will it rest? A distinction so important must in reason be one which can be drawn with some reasonable degree of certainty in every case, and must be capable of practical application. Is the line to be drawn according to density of population, and, if so, what degree of density is to be the test? Is it to depend upon the activity and hopefulness of adjoining landowners in platting their land into building lots, or upon the question whether a neighboring village or town can properly be called a suburb of the principal city? Or is it to depend upon a judicious consideration of all these conditions massed together, and upon a conclusion to be evolved from the entire mass, which will determine the answer to the question in each particular case, but in no other? Or, on the other hand, must it be held that, in order to make a highway a city street, it must lie within the corporate boundaries of the city, and that outside of those boundaries no reasonable or practicable distinction can be drawn based either on proximity to the city, or on platting of lands or density of population, or upon the fact that the highway connects the

city with a neighboring suburban village? These are all important questions, which, as before indicated, are new in this court, and demand careful consideration.

It was long ago held by this court, following the well-nigh universal current of authority, that a horse railway constructed upon grade in a city street, and by permission of the city authorities, was not an additional burden upon the fee, and that the adjoining landowner was not entitled to compensation therefor: Hobart v. Milwaukee City Ry. Co., 27 Wis. 194; 9 Am. Rep. 461. In a recent case it was further held by this court that an electric railway constructed under a charter authorizing it to carry passengers, merchandise, baggage, mail, and express matter, and running from city to city, was not a street railway within the meaning of the Hobart case, so far as it passed over the highways of intervening country [89] towns, and that it could not use such highways without the consent of, or compensation paid to, the owners of the abutting real estate: Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co., 95 Wis. 561; 60 Am. St. Rep. 137. No other decisions directly bearing on the controversy before us now have been made in this court, and it is manifest that neither of the cases referred to is decisive of the questions here involved.

In other courts there have been decisions holding more or less directly that an electric street railway upon a city street constructed with poles and a trolley wire stands in the same legal situation as a horse railway, and does not constitute necessarily an additional burden to the fee. These cases will be found cited in the note to section 83 of Booth on Street Railway Law, although it is entirely clear that the cases cited do not all support the broad proposition which the writer lays down. Most of these cases were reviewed by Ragan, C., in Jaynes v. Omaha Street Ry. Co., 53 Neb. 631, and it is not deemed necessary to review them in this opinion, as the question is not before us. The Nebraska case cited seems to reach the conclusion that if an electric street railway on a city street moves its cars without occupying permanently any part of the street with poles or wires, as, for instance, by storage batteries, it does not constitute an additional burden simply because the motive power is electricity; but that the planting of poles in the street, so as to interfere with an abutting owner's right of access to his property, will constitute an additional burden for which compensation must be made. We have been referred to no case which squarely holds that the mere fact that the cars upon a street railway in a city street are propelled by electricity by the overhead trolley system, instead of by animal

power, makes the railway, as a matter of law, an additional burden, although very vigorous dissenting opinions to that effect may be found in the case of Detroit City Ry. Co. v. Mills, 85 Mich. 634.

[90] The question has not been presented to this court, and hence has not been decided, and cannot be decided now. The question here presented is, whether such a railway is an additional burden when it is to be operated upon a highway in a country town, and when, also, the railway company proposes to grade down the highway, for the purpose of laying its track, to such an extent as to seriously impair the right of access of adjoining lotowners. It is very evident that this last-named consideration is an important one.

Conceding for the moment that the highway should be treated as a city street and that an electric trolley system operated upon grade upon such a street is not an additional burden upon the fee, still it has not been yet held by this court that the public authorities could lawfully authorize a street railway company to grade down a street for the express purpose of laying its tracks and operating its road to the impairment of the abutting owners' right of access. It was said in Hobart v. Milwaukee City Ry. Co., 27 Wis. 194, 9 Am. Rep. 461, that a horse railway upon a city street was not an additional burden "except when some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby"; and this is certainly in accord with the authorities. Now, it appears very conclusively here that the proposed grading of the highway is about to be done by the defendant company, by consent of the town authorities, for the express purpose of enabling the company to successfully build and operate its street railway. One of the officials of the company, whose affidavit was used upon the hearing of the motion, deposed that the defendant's cars could not be practically or economically operated over the highway if the grade were not changed, and that the company had always refused to extend its line on that account, and that, before it consented to extend the line, it insisted that the new grade be established. It was evidently solely in consequence of this demand by the street railway company [91] that the town authorities made the agreement with the company, binding it to do the grading at its own expense, and to hold the town harmless from all claims for damages resulting therefrom. There does not seem to have been any other demand that the grade be changed. The highway had been in use for many years, and

had sufficed for all ordinary purposes of travel; and it is evident that the change was to be made simply to meet the requirements of the street railway service, and in pursuance of the demand of the company. It is, of course, true that the bed of the highway, when graded, would have a somewhat easier grade for the uses of ordinary travel, but that seems to have been merely an incidental result. The object aimed at was to fit the highway for the corporate uses of the street railway company, and hence it was very reasonably insisted by the town authorities that the railway company, being the beneficiary, should defray the expense. This being so, the question is whether in fact the railway company is not about to materially impair the right of access of the adjoining lotowners by the construction of its railroad, within the meaning of the decision in the Hobart case, and whether it can do so without compensation.

It is said on behalf of the company that the town board has full power to change the grade of the highway at pleasure, and without payment of compenstion to lotowners, and that the company is simply acting as the agent or employé of the town board in doing the grading, and hence that such grading cannot be considered as any part of the construction of the railroad, but rather the exercise of the power of the town to grade highways.

It has been held in this state that cities and other municipal corporations which are endowed with power to fix and change the grades of streets are not liable to adjoining lotowners for such changes, in the absence of express statutory provision for compensation. This principle is so well [92] established that it is unnecessary to cite authorities in its support. The assumption that town boards have the same broad powers as to the grading of highways as are generally conferred upon the authorities of cities is somewhat doubtful, to say the least, if not unwarranted by the provisions of the statutes. It is true that town boards have the care and supervision of the highways and bridges of the town, and it is their duty to see that they are kept in repair, and that obstructions are removed. They are also required to divide the town into road districts, and levy highway taxes, and to require the overseers of highways to perform their duties, and they have power to lay out new highways: Rev. Stats. 1878, sec. 1223, as amended by Laws of 1885, c. 103. These comprise the general duties of the town boards as to highways, and we are not referred to any section empowering the board to make any such radical change of grade as was attempted here, in the absence of some showing that such grading was necessary in order to make the

highway safe for travel. Doubtless, the board may make such changes in the surface of the road as will make it safe for travel, because they are charged with the duty of providing reasonably safe highways, and they must, of course, possess powers broad enough to carry out this very important duty; but, when it cannot be shown that a change is necessary to accomplish this purpose, the question as to their power to make a change prejudicial to the adjoining property owners seems doubtful. We do not, however, decide this question, because we do not deem it necessary. Grant, if you please, that the power exists; still it is entirely certain that it is a power to be exercised solely for the public good, and not for the benefit of a private corporation or individual. Upon this subject the following very pertinent remarks are made in Elliott on Roads and Streets, page 558, note 4: "The rule that municipal corporations may change the grades of streets at pleasure is, at best, not easily defended, and to so extend it as to make [93] it work for the benefit of a private corporation at the expense of a property owner, is given a harsh rule an application that it should never receive. We do not believe that the discretionary power to change grades of streets exists where the change is solely for the benefit of a private corporation or individual. We cannot avoid the conviction that the courts may inquire whether the change is for municipal purposes or exclusively for the benefit of a private corporation, and, if they find that it is solely for the benefit of such a corporation, they may rightfully interfere."

These views seem to us reasonable and just. In the present case, it is certain that the attempted change of grade was made at the demand of, and primarily for the sole benefit of, the street railway company. No fact could be more clearly proven than this fact is in the case. Whatever small benefits the general public may receive in the way of an easier grade for vehicles or the privilege of riding upon the electric cars are merely incidental to the main object. That main object was and is the pecuniary benefit to the street railway company arising from the operation of street-cars over the highway, which was impracticable before the change, and will be practicable after the change. The town authorities had no intention of grading the street, and the public did not demand it. We believe public powers which are held in trust to be exercised for the benefit of the whole people ought not to be, and cannot be, farmed out to an individual for his own especial benefit, when private rights are thereby invaded. Such proceedings seem to us clearly against public policy. The vice

lies not in the fact that the work is physically done by the street railway company instead of by the employés of the town. The town may probably choose its own agents, to whom it may intrust the performance of lawful public works. But the vice lies in the fact that the work itself is primarily and essentially private work, done by a private corporation, for the advancement [94] solely for its own ends, and is not a work demanded by the public, or which would be undertaken by the town as a necessary public work.

The question is certainly not free from difficulty. It is stated in Booth on Street Railway Law, section 92, that if a street railway company, acting under authority of the city council in laying its tracks, changes the grade of a street to conform to a new grade established by the municipality, and does the work properly and skillfully, as directed by the city authorities, it will not be liable to an abutting owner for incidental damages. The cases cited in support of the doctrine seem to be cases where the city, acting in exercise of its undoubted powers, has fixed the grade of the street for the benefit of the whole public, and thereafter the railway company has built its road, and done the necessary grading to put its tracks upon the legal grade: Briggs v. Lewiston etc. Ry. Co., 79 Me. 363; 1 Am. St. Rep. 316; Inter-State etc. Ry. Co. v. Early, 46 Kan. 197. Such cases are manifestly not this case. It is very certain that a street railway cannot change the grade of a street to suit itself, and thereby injure the property owner's right of access to his property: Booth on Street Railway Law, sec. 91; Nichols v. Ann Arbor etc. Ry. Co., 87 Mich. 361. Regarding the change of grade here to be made as substantially a change made by the railroad company for its own ends, and purely to enable it to operate its road successfully, we are unwilling to subscribe to the doctrine that the mere consent of the town authorities will free the railway company from liability to the adjoining property owner whose property will be rendered practically inaccessible. We regard it as clear that the abutters' right of access has been cut off by the building of the road and the necessary acts connected therewith, and not by the merely nominal act of the town board in attempting to fix the grade at the request and for the sole benefit of the street railway company.

[95] There is, however, another question in the present case, which is much broader in its scope, and which is becoming a more pressing question every day; and that is the question whether passenger railroads operated by mechanical power can

be laid over country highways without consent of, or compensation paid to, the adjoining landowner; or, in other words, Are they additional burdens to the fee? The development of electric railways and motors is so rapid that this question should, if possible, be settled, as the day is evidently not far distant when such passenger railways running from city to city will be numerous, and extend to all parts of the state. It is well settled that a horse railroad upon a city street, built upon grade, and for the carriage of passengers only, is not an additional burden. The drift and weight of authority in other states seem to be also that the operation of the road by electricity or other mechanical power does not change the nature of the road in this respect, although it is also held by some other courts that, if permanent erections in the street interfering with the right of access are necessary for the operation of the road, these may constitute an additional burden. This court, however, has not passed upon these questions; and, however they may be decided, the result would not necessarily determine the status of a country road in these respects.

That there are many and marked differences between the uses to which a city street is put and the uses to which a country highway is put cannot be denied; nor can it be denied that the uses contemplated when the land is taken vary widely, except that both are intended for purposes of travel. The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly, a city convenience, for use in 96 the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of the street railways remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street, and rather as a help to the street than as a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered, and it is found that by its use an enlarged city street-car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation, covering long distances and connecting widely separated cities and villages, by using the

country highways and operating long and heavy coaches, sometimes made up into trains of several cars. Thus, the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city [97] to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus, the operation of this newly developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many.

However we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere street railway, which was held in the Hobart case not to be an additional burden on the fee. The reasons given for that holding in that case either do not apply at all, or only in a very limited degree, to the interurban railway. The difference is not so much in the change of motive power as in the entirely different character of the use. Suppose a steam railway corporation were organized to carry passengers only from city to city, and should attempt to lay its track upon the country roads without compensation; is there any doubt but that it would be held that it could not do so? We think not. Our conclusion is, that an interurban electric railway, running upon the highways through country towns, is an additional burden upon the highway: Penn-

sylvania Ry. Co. v. Montgomery Co. Pass. Ry. Co., 167 Pa. St. 62; 46 Am. St. Rep. 659.

But it is said that a distinction should be drawn between a highway in close proximity to a city, or running between the city and a neighboring suburb, and the ordinary country road through a farming district The suggestion is not without weight. There is much difference between the practical uses to which the two highways are generally put. The suburban highway very frequently approximates closely [98] to the city street. But, as indicated at the outset of this opinion, the difficulty in drawing any clear line of demarkation between the two is very great. If a line be drawn in one case upon the facts in that case, depending upon mere proximity, or upon the manner of use, or the density of population, or the prospect of rapid settlement, or upon all of these circumstances together, it cannot apply to any other case; and the question will always be one of doubt and embarrassment, leading to different conclusions in different courts. Such a condition of the law is to the last degree undesirable. The legislature, by chapter 175 of the Laws of 1897 has provided that such corporations may condemn lands necessary for their use, but has further provided that the act should not apply to streets in an incorporated city. In thus clothing street railway companies with the power to condemn as to all property except streets within city limits, the legislature seems to have indicated its conclusion that the city line was the proper line of demarkation, and that within that line, at least, condemnation of a street was unnecessary. While this legislative idea has no binding force in determining the question of additional burden, it may justly be considered by the court which is called upon to pass upon a question beset with so much difficulty. If the line be fixed at the limits of the corporation, it will at least have the great merit of certainty, and be capable of unerring application. Presumably, the city limits include the entire urban area, and we feel, under all the circumstances, that it is the true and proper line.

We are not unmindful of the fact that the questions discussed in this opinion are vexed questions, upon which there has been much contrariety of opinion in the various courts of the country, and that the law is only in process of settlement, and must continue in that condition for years. In endeavoring to draw the line between the public right of passage, upon the one side, and the rights of the private [99] owner, on the other, great care is manifestly needful that neither be sacrificed nor unduly magnified at the expense of the other.

We held in the case of Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co., 95 Wis. 561, 60 Am. St. Rep. 137, that an electric railway for the carriage of passengers, freight, and express matter between cities constitutes an additional burden upon the highway in a country town through which it passes. We hold in this case that an electric passenger railroad upon a country highway falls under the same rule. Both holdings seem to us to be founded upon good reason as well as authority, and we believe them to be salutary and just.

By the Court. Orders affirmed.

HIGHWAYS — RIGHTS OF ABUTTING OWNERS — ADDITIONAL SERVITUDES.—The servitude which the public acquires by taking land for a public use is that of a public use for the convenience of the public, to be molded or applied as public interests or convenience may demand, and as the methods of mankind may, from time to time, require. Hence, a way may be employed for new methods of transit: Taylor v. Portsmouth etc. Street Ry. Co., 91 Me. 193; 64 Am. St. Rep. 216, and note; but abutting owners have a right appurtenant to their property, of access to it from the adjacent streets and alleys, and this right is as inviolable as their right to their property: Sherlock v. Kansas City Belt Ry. Co., 142 Mo. 172; 64 Am. St. Rep. 551; and an additional servitude for which abutting owners may demand compensation may be imposed when the result is to destroy the use of the highway as a public thoroughfare or unreasonably interfere with the right of abutting owners to have access to and egress from, their property to such street or highway: Sherlock v. Kansas City Belt Ry. Co., 142 Mo. 172; 64 Am. St. Rep. 551. Compare Reid v. Norfolk City Ry. Co., 94 Va. 117; 64 Am. St. Rep. 708, and note. Electric railways traversing county highways without legislative consent, and connecting widely separated cities and towns, impose additional servitudes on the highways so occupied: Pennsylvania R. R. v. Montgomery County etc. Ry., 166 Pa. St. 62; 46 Am. St. Rep. 659, and note.

MILLER BREWING COMPANY *v.* MANASSE.

[99 WISCONSIN, 99.]

MORTGAGE, ASSIGNMENT OF, FAILURE TO RECORD. A transfer before maturity of a note secured by a mortgage passes the security as an incident, and if the transferee has possession of the note, his rights cannot be prejudiced by any subsequent transfer which the mortgagee may make, though his title, so far as the public records disclose, appeared to be perfect. The possession of the note by the transferee was of itself sufficient to charge all persons with notice of his interest therein.

Suit to foreclose a mortgage. The defendant Manasse claimed to be the owner of the mortgage under an assignment made by the mortgagee in January, 1897, and duly recorded. Before

that time the note had been indorsed and delivered to the plaintiff as collateral security for the payment of a debt. Of such indorsement and delivery the defendant Manasse had no actual notice at the time of the assignment to her. The trial court decided that the assignment to the defendant Manasse was subject to the prior unrecorded transfer to the plaintiff.

Charles L. Aarons, for the appellant.

Nath. Pereles & Sons and C. F. Hunter, for the respondent.

102 MARSHALL, J. The findings of fact are amply sustained by the evidence. The only question of law that need be decided is, Does a person become the bona fide holder of a note and mortgage by purchasing them for value, of another who has title thereto of record, while the same are in possession of a third person who received them as security from such other, and took title thereto for such purpose, by an assignment of the note in blank, and a delivery thereof, together with the mortgage, so as to cut off the rights of such third person? That must be answered in favor of the respondent in accordance with the decision of the trial court. A mortgage is not property at all independent of the debt it secures. The extinguishment of the debt ipso facto et eo instanti extinguishes the mortgage. The mere entry on the record of a release of the mortgage is not for the purpose of extinguishing it, but as evidence of a previous discharge of the debt: Martineau v. McCollum, 3 Pin. 455; Croft v. Bunster, 9 Wis. 503; Kelley v. Whitney, 45 Wis. 110; 30 Am. Rep. 697. In the latter case, Mr. Justice Cole said, in effect, that it is the settled law of this state that the transfer of a note before maturity, secured by a mortgage, vests in the transferee the note, discharged of all equities of the former holder, and carries with it, as an incident thereto, the mortgage as well, discharged of equities in a like degree. It follows that the appellant took no greater title by her assignment of the mortgage than the interest which Thelen reserved when he transferred the securities to respondent. Its possession of the note and mortgage was notice to the appellant and to all other persons dealing with the securities, of its interests therein.

By the Court. The judgment of the superior court is affirmed.

MORTGAGES—UNRECORDED ASSIGNMENT.—The transfer of a note secured by a mortgage is ineffectual as against an innocent third person having no notice of the transfer who deals with the

property in good faith in the belief that the mortgagee remains the owner of the mortgagee indebtedness. Hence, a purchaser of the property, though before the maturity of the mortgage debt, receiving a conveyance both from the mortgagor and the mortgagee, is entitled to hold it as against an assignee whose assignment is not of record, though such purchaser did not make any inquiry respecting the note which the mortgage purported to secure, and, had he done so, must have discovered that it was not in the possession of the mortgagee: Jenks v. Shaw, 99 Iowa, 604; 61 Am. St. Rep. 256. Compare Demuth v. Old Town Bank, 85 Md. 315; 60 Am. St. Rep. 322, and note; Curtis v. Moore, 152 N. Y. 159; 57 Am. St. Rep. 506, and note.

ROANE IRON CO. *v.* WISCONSIN TRUST CO.

[99 WISCONSIN, 273.]

CONSTITUTIONAL LAW — TRUST COMPANIES — SPECIAL LEGISLATION.—A statute authorizing the formation of a corporation to act as a trustee in the execution of trusts of various kinds and to execute the offices of executor, administrator, trustee, receiver, or assignee, and exempting it from taking any oath and from giving any bond or security, except in the discretion of the court, other than the deposit of a certain amount of securities with the state treasurer, is constitutional. It is not special legislation, nor does it discriminate in favor of a class.

CORPORATION — COLLATERAL ATTACK UPON.—The right of a corporation to act as such cannot be attacked in a collateral suit or proceeding by proving that certain subscriptions to its capital stock had not been paid in cash but in securities.

Mock, Riley, Wittig & Schinz, for the appellant.

Quarles, Spence & Quarles, for the respondent.

274 WINSLOW, J. On the eighth day of June, 1896, the Moore Manufacturing & Foundry Company, a corporation, made a voluntary assignment for the benefit of its creditors to the Wisconsin Trust Company, which accepted the trust, and received into its possession the property of the assignor. The trust company is a corporation organized and existing under chapter 158 of the Laws of 1887, chapter 263 of the Laws of 1891, and chapter 160 of the Laws of 1895. The trust company took no oath, and gave no bond as assignee, but had complied with all the requirements of law as to the depositing of securities with the state treasurer. The plaintiff company, being a creditor of the assignor, thereupon garnished the trust company, and claims 275 that the assignment is void. The garnishee is a trust company organized pursuant to law for the purpose of acting as trustee in the execution of trusts of various kinds, and among the powers conferred on it by law it is author-

ized to execute the offices of executor, administrator, trustee, receiver, or assignee, and in such cases it is not required to take any oath or give any bond or security, except in the discretion of the court, other than the deposit of a certain amount of securities with the state treasurer: Laws 1891, c. 263, sec. 6, as amended by Laws 1895, c. 160.

The principal contentions made by the appellant are that the law authorizing such companies to act as assignee without bond such as is required of a natural person is unconstitutional, as special legislation, conferring corporate powers, and as discriminating in favor of a class: Const., art. 4, sec. 31. It is also claimed that the act attempts to confer banking powers, and hence is void, because it has not been submitted to vote of the people: Const., art. 11, sec. 5. That a corporation may be authorized by law to act as trustee is very well settled: 1 Beach on Trusts, sec. 12; 2 Beach on Trusts, secs. 674, 675; Chaplin on Express Trusts, sec. 112. That the law authorizing the organization of such corporations is a general, and not a special or private, law is certain. There is no more reason for calling it a special or private law than there is for calling all of the general laws which authorize the formation of corporations for specified purposes and with specified powers, special or private laws. The fact that it gives no bond except in the discretion of the court, but gives security by depositing securities with the state treasurer, cannot be considered as unjust discrimination. Such reasoning would invalidate many just and salutary laws. The question is one of legislative policy: Minnesota etc. Co. v. Beebe, 40 Minn. 7.

We have not been able to see that the act confers banking powers on such companies. The act itself provides that [276] "nothing herein contained shall be construed as giving the right to issue bills to circulate as money, or buy or sell bank exchange, or do a banking business."

An attempt was made to show that certain of the subscriptions to the capital stock of the trust company had not been paid in cash, but in securities. This question could not be raised by collateral attack.

The judgment dismissing the garnishment proceedings was plainly right.

By the Court. Judgment affirmed.

CORPORATIONS—RIGHT TO ACT AS SUCH—COLLATERAL ATTACK.—The validity of articles of incorporation cannot be inquired into incidentally and collaterally: Pott v. Schmucker, 84 Md.

535; 57 Am. St. Rep. 415, and note. The failure of a corporation to complete its organization within the time directed by law cannot be taken advantage of in a collateral proceeding: Boyd v. Redd, 120 N. C. 335; 58 Am. St. Rep. 792. Nor can the rightful existence of a corporation de facto be called in question in such a proceeding: Finch v. Ullman, 105 Mo. 255; 24 Am. St. Rep. 383, and note; Laflin etc. Powder Co. v. Sinsheimer, 46 Md. 315; 24 Am. Rep. 522.

RASCH *v.* NOTH.

[99 WISCONSIN, 285.]

EJECTMENT—PROJECTING EAVES.—One who occupies his premises up to his boundary line cannot maintain ejectment against the proprietor of the adjoining premises who has constructed a building up to such line having eaves which project several inches beyond it and over the line of the plaintiff's property and thereby cast water upon the roof of his building.

James Kirwan and L. J. Nash, for the appellant.

J. E. McMullen and C. E. McMullen, for the respondent.

286 CASSODAY, C. J. This is an action of ejectment. The defendant answered by way of a general denial and adverse possession. A trial by jury being waived, the cause was tried by the court, and the findings of the court are to the effect that block 4 of the village, now city, of Chilton, was platted in 1852, and consisted of lots 1, 2, and 3, lying in the extreme northern portion of the block, which was of irregular shape, and another large and irregular lot, called the "mill lot," adjoining them upon the south; that the plaintiff owns the west one-half of the mill lot, which is immediately south of lot 3, and the defendant owns lots 1, 2, and 3; that both parties claim through and under a common grantor as far back as 1865; that at that time stakes designating the corners of the lots and the division line between lot 3 and the mill lot were still standing, and were pointed out to the purchaser; that in 1869 the original plat stakes were still standing and visible; that the then proprietors of lot 3 and the mill lot, respectively, participated in the location of the line between the two lots, and built a line fence thereon; that the same was then treated by the respective proprietors as the division fence located upon the true line between lot 3 and the mill lot until 1883, when the then proprietors conveyed lots 1, 2, and 3 to the defendant, who has since occupied up to such line fence as the true line; that in 1875 the respective proprietors dug a well on the line of said fence, each paying one-

half of the expense of its construction; that in 1891 the west one-half of the mill lot was conveyed to the plaintiff; that since that time the plaintiff and defendant have used the well in common; that the premises in dispute are northerly from such division fence, and are a part of lot 3, and not a part of the mill lot; that since 1869 the defendant and his grantors have held and occupied adversely all of the land lying northerly from the division fence; that the defendant has built upon lot 3 a barn, which stands and rests wholly upon his own soil, northerly from [287] the division fence; that the eaves of such barn did project and overhang the line to the extent of ten or eleven inches, but that the drip from the eaves fell upon the plaintiff's barn, which was also built so close to the line that its eaves, being lower down than the eaves of the defendant's barn, received and receive upon the northerly slant of its roof the water dripping from the eaves of the defendant's barn, and cast the same, together with all that falls upon its northerly slope, back northward on the defendant's land; that no complaint by the plaintiff or his predecessors or grantors was ever made to the defendant on account of the projection and overhanging of the eaves of the defendant's barn, and no evidence was given as to damage, if any, occasioned by such projection.

As conclusions of law, the court found, in effect, that such projection of the eaves of the defendant's barn constituted an invasion of the plaintiff's rights which was redressible in an action of ejectment; that the plaintiff was entitled to judgment accordingly, and for costs, and ordered the same to be entered. From the judgment so entered the defendant brings this appeal.

We are clearly of the opinion that this action of ejectment cannot be maintained upon the facts found by the trial court. Certainly, the cases in this court do not authorize a recovery in such a case: McCourt v. Eckstein, 22 Wis. 153; 94 Am. Dec. 594; Zander v. Valentine Blatz Brewing Co., 89 Wis. 164; 95 Wis. 162. This last case, in line with the first, held, in effect, that "an intrusion by one lotowner of his foundation wall upon the land of the adjoining owner, without permission, is a trespass, and may be treated as a disseisin; but, if the owner of the land so intruded upon extends his own building to his line, and rests it upon such wall, and occupies the same continuously, he thereby elects to treat the intrusion as a mere trespass, and cannot maintain ejectment therefor." While it is found in the case at bar that the eaves of the defendant's [288] barn projected ten or eleven inches over the line, yet it was also found that the

eaves of the plaintiff's barn projected under the eaves of the defendant's barn sufficiently to carry the water from both roofs northward onto the defendant's land. There is no dispute but that each party owns and occupies to the line mentioned. The only dispute is as to whether the plaintiff can maintain ejectment for such projection of the eaves of the defendant's barn, upon the facts found; in other words, whether the plaintiff can thus occupy his premises clear to his line, and at the same time maintain ejectment for such mere intrusion. And we must hold that he cannot. There are cases holding that one is liable in ejectment for the projection of his roof over another's land: Murphy v. Bolger, 60 Vt. 723; Sherry v. Frecking, 4 Duer, 452. In others it is held that such action cannot be maintained: Aiken v. Benedict, 39 Barb. 400; Vrooman v. Jackson, 6 Hun, 326. See, also, Leprell v. Kleinschmidt, 112 N. Y. 364, where the question was left undetermined; Harrington v. Port Huron, 86 Mich. 46. It is unnecessary to determine the question in the case at bar.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the complaint.

EJECTMENT—RIGHT OF ACTION.—Plaintiff in ejectment, or the statutory action in the nature of ejectment, may recover on proof of prior actual possession only as against a mere trespasser in possession, without regard to the validity or sufficiency of the muniments of title offered in evidence to support a recovery: Green v. Jordan, 83 Ala. 220; 3 Am. St. Rep. 711. Ejectment will lie only for things whereof possession may be delivered, and it will not lie for a mere license, an incorporeal hereditament, right of way, or an easement: Hancock v. McAvoy, 151 Pa. St. 460; 31 Am. St. Rep. 774, and note.

CURRY *v.* COLBURN.

[99 WISCONSIN, 319.]

THE DELIVERY OF A DEED is a question of intention. The handing of it to the grantee, to be taken to his lawyer for examination, with the understanding that the parties will meet subsequently and complete their bargain, is not a delivery. There can be no delivery of a conveyance until the grantor parts with it with the intent to pass the title.

DEED—PAROL EVIDENCE TO PROVE THAT, THOUGH GIVEN TO THE GRANTEE, IT WAS NOT DELIVERED.—It is always competent to show by parol evidence that a deed, although put in the grantee's hands by the grantor, was not delivered with intent to pass the title, unless the grantor, or those claiming under him, are in some way estopped from denying delivery.

Webster & Classon, for the appellant.

George C. Greene, for the respondent.

320 BARDEEN, J. The plaintiff brings this action in ejectment to recover possession of a tract of land in the city of Marinette. The answer is a general denial, and a counterclaim substantially to the effect that both parties claim title from one Fairchild, and that the deed under which plaintiff claims title was never in fact delivered to him with intent to pass title. A reply asserts the validity of plaintiff's deed, and that defendants took title with notice of the plaintiff's rights. The chief question litigated on the trial was whether the deed from Fairchild to plaintiff had ever been delivered. The court found that such deed was handed by Fairchild to plaintiff merely for examination and inspection, and was not delivered with the intention of passing the title. As conclusions of law, the court found that defendants were entitled to judgment dismissing the complaint and canceling said deed.

There is ample evidence to support the conclusions arrived at by the trial judge, and his findings of fact cannot be disturbed. The deed in question was not dated or acknowledged. It was simply handed to plaintiff by Fairchild, at the former's request, to be taken to his lawyer for examination, and the parties were to meet later to complete the bargain. No particular form is necessary to constitute the delivery of a deed. It is sufficient when the deed is executed, and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect: Bogie v. Bogie, 35 Wis. 659. Like every other contract, there must be a meeting of the minds of the contracting parties—the one to sell and convey, and the other to purchase and receive—before the agreement is consummated: Welch v. Sackett, 12 Wis. 243. The question of delivery is largely of 321 intention: 1 Devlin on Deeds, sec. 262. And a deed never becomes operative until it is delivered with the intent that it shall become effective as a conveyance: 1 Devlin on Deeds, sec. 262. Counsel for the plaintiff argue earnestly that, because the deed was handed by Fairchild to the plaintiff, this constituted a full and complete delivery, and that evidence was not admissible to show the actual condition then existing. No doubt, a great deal of discussion and unnecessary refinement may be found in the books, bearing upon this question; but the main principle must predominate, that, to constitute a valid delivery of a deed,

the grantor must part with his dominion over it, with intent to pass the title.

The ancient rule that a deed cannot be delivered in escrow to the grantee in no way conflicts with our conclusions. A delivery in escrow contemplates complete loss of control over the deed. Here the incomplete deed was handed to the grantee, to take to his lawyer for inspection. By the terms of their agreement of sale, a mortgage was to be made, a party wall contract was to be executed, and part of the consideration to be paid. There was nothing in the circumstances to show that Fairchild in any way intended to part with his dominion over the deed. On the contrary, they all tend to establish the conclusion arrived at by the trial court. That parol evidence is admissible to show that a written instrument has never been delivered so as to bind the parties thereto is established by the following cases: Gibbons v. Ellis, 83 Wis. 434; Price v. Hudson, 125 Ill. 284; Brackett v. Barney, 28 N. Y. 333; Roberts v. Jackson, 1 Wend. 478; Reichart v. Wilhelm, 83 Iowa, 510. In Price v. Hudson, 125 Ill. 284, the court remark: "It is not competent to control the effect of the deed by parol evidence, when it has once taken effect by delivery, but it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered, unless the grantor, or those claiming through him, [322] are estopped in some way from asserting the nondelivery of the deed."

Not to prolong this discussion, we conclude that the decision of the trial judge upon the law finds ample support both upon principle and authority.

By the Court. The judgment of the circuit court is affirmed.

DEEDS—DELIVERY OF—WHAT CONSTITUTES.—The question of delivery is said to be mainly one of intention, and the rule commonly stated is, that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed, and for it to pass the title at the time: See monographic note to Brown v. Westerfield, 53 Am. St. Rep. 544, as to what is delivery of a deed. The mere placing of a deed in the hands of one of the grantees does not necessarily constitute a delivery: Wilson v. Wilson, 158 Ill. 567; 49 Am. St. Rep. 176, and note. The important test of a delivery in any case is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery, were done: Weber v. Christen, 121 Ill. 91; 2 Am. St. Rep. 68.

BASSETT *v.* BASSETT.

[99 WISCONSIN, 344.]

ALIMONY—POWER OF COURT TO PROVIDE FOR AFTER A DIVORCE.—Under a statute declaring that if a judgment provide for alimony or other allowance for a wife and children, or either of them, the court may, from time to time, on petition of of either party, revise and alter such judgment respecting the amount of alimony or allowance, the court which, at the granting of a divorce, made no provision whatever for alimony or allowance, cannot subsequently and after expiration of the term make a provision upon these subjects.

Edward S. Bragg, for the appellant.

DeW. C. Priest, for the respondent.

345 BARDEEN, J. The question involved in this appeal is new and interesting, and is raised for the first time in this court. It depends largely, if not entirely, upon the proper reading and construction of section 2369 of the Revised Statutes of 1878, which is as follows: "After a judgment providing for alimony or other allowance for the wife and children, or either of them, or for the appointment of trustees as aforesaid, the court may, from time to time, on the petition of either of the parties, revise and alter such judgment, respecting the amount of such alimony or allowance, and the judgment thereof, ... and may make any judgment respecting any of said matters which such court might have made in the original action. But when a final division of the property shall have been made under the provisions of section 2364, no other provision shall be thereafter made for the wife." The nature of the 346 judgment and any power of the court over it must be determined by the proper construction of this statute. Except in cases coming within some statutory power, it is the settled law of this state that the courts have no power to revise, alter, or set aside their judgments after the term at which they were rendered: Aetna etc. Ins. Co. v. McCormick, 20 Wis. 265; Salter v. Hilgen, 40 Wis. 363; Bacon v. Bacon, 43 Wis. 197; Day v. Mertlock, 87 Wis. 577. And this rule applies to all matters on which the mind of the court did act, or is presumed from the record to have acted, in the rendition of the judgment; else, there might never be an end of litigation.

The courts in this state have no common-law jurisdiction over the subject of divorces, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute: Kempster v. Evans, 81 Wis. 247.

This is also the rule in New York: Erkenbrach v. Erkenbrach, 96 N. Y. 456. Another proposition quite firmly settled by the adjudications in this state is that the revisory power of the court, under this section, is always open when the court has, in the first instance, granted alimony or made some allowance short of a final division of the husband's property: Campbell v. Campbell, 37 Wis. 206; Cook v. Cook, 56 Wis. 195; 43 Am. Rep. 706; Blake v. Blake, 75 Wis. 339. These decisions recognize the fact that the power of the court in this respect is limited and environed by the letter of the statute, and cannot be exercised except in cases that come plainly within its terms. Mr. Justice Taylor, in a concurring opinion in Cook v. Cook, 56 Wis. 195, 43 Am. Rep. 706, however, seems to have lost sight of the limitations which bind the courts. He there makes the broad statement that "the power of the court to award alimony to a wife in a divorce suit does not depend on the fact that some alimony was awarded at the time the judgment of divorce was granted." He was somewhat cautiously followed by Chief Justice Cole in Crugom v. Crugom, [347] 64 Wis. 253. In that case, as in this, the judgment was silent as to alimony, and the record did not show that any claim was made by the wife for alimony. The learned chief justice says: "The tendency of the decisions to which we have referred clearly is that the court has the statutory power to award alimony, though the judgment for divorce, long since rendered, does not mention it." But in every decision to which he makes reference some provision had been made in the original judgment for the wife, short of final division of the property.

In the case at bar, the plaintiff, in her complaint, demanded an allowance as alimony or a division of the property. She sought the enforcement of a preliminary order requiring the defendant to pay alimony, but was defeated. She then took her judgment, which was silent as to alimony. The law presumes that every question involved in the action was passed upon by the court; and the judgment became final, not only as to the matter actually determined, but as to every other matter which the parties might, under the pleadings, have litigated in the cause: Kamp v. Kamp, 59 N. Y. 212. So when the plaintiff took her judgment without securing the rights she might have obtained under the pleading, it may well be claimed that the judgment stands res adjudicata for all time. But, were this not so, we still think she is remediless under the statute. It says: "After a judgment providing for alimony, or other allowance for the

wife and children, or either of them," the court may revise and alter the same. The policy of the law is that judgments once solemnly entered shall be final and conclusive, and, when the term is ended, the record is in the roll, and not in the breast of the judges. Under the statute, what judgment is it that may be altered and revised after the term? Clearly, only such a judgment as shall have made some provision for alimony or allowance to the wife. By expressly granting the authority to revise or alter a particular [348] judgment, it impliedly prohibits the exercise of that power as to any other judgment. We therefore desire to say with as much emphasis as we may that, under this section of the statute, the trial court has no power to alter or revise a judgment for divorce unless the judgment itself shows that some provision was made for alimony, or some allowance made to the wife. Whatever was said in the Crugom case or prior cases in conflict with this construction must be deemed to be overruled. The conclusion arrived at seems amply sustained by a reading of other sections of the statutes relating to divorce.

By the Court. The order of the county court of Fond du Lac county is reversed, the defendant to pay clerk's fees and cost of printing plaintiff's brief.

MARRIAGE AND DIVORCE — ALIMONY — ALLOWANCE AFTER DECREE OF DIVORCE.—A judgment in a divorce suit settling the property rights of the parties without an award of alimony is, after the time for appeal has elapsed, as final as any other kind of a judgment, except so far as the power to modify it may be reserved by the court itself, or is given by statutory provisions. In such a case, in the absence of such reservation or power, the court has no jurisdiction to make an order or supplemental decree granting alimony for the support of the wife and children: Howell v. Howell, 104 Cal. 45; 43 Am. St. Rep. 70, and note. See extended note to Buckminster v. Buckminster, 88 Am. Dec. 657, and monographic note to Methvin v. Methvin, 15 Ga. 97; 60 Am. Dec. 665.

FIEDLER *v.* HOWARD.

[99 WISCONSIN, 388.]

HUSBAND AND WIFE.—A note executed to and in the name of a husband and wife vests in them as joint tenants, and upon the death of either belongs wholly to the survivor.

HUSBAND AND WIFE—FRAUD UPON CREDITORS BY TAKING NOTE IN JOINT NAMES OF.—If a husband and wife have a homestead which he wishes to sell, but she refuses to join in a conveyance unless a note and mortgage, to be given for a part of the purchase price, are in the joint names of herself and husband, and they are so taken, the transaction is not fraudulent as against

his creditors, and, upon his death, the whole title to such note vests in her, and the creditors have no interest therein.

APPEAL—ESTOPPEL TO INSIST UPON WAIVER OF RIGHT OF.—If a respondent insists that an appellant file a bond on appeal, and obtains an order of court requiring it to be filed, which order is complied with, such respondent waives any objection that the right of appeal had, before the procuring of such order, been waived by the appellant by his accepting some benefit under the judgment appealed from.

APPEAL, RIGHT OF, WHEN NOT WAIVED BY ACCEPTING BENEFIT UNDER A JUDGMENT.—If a party is entitled to a sum of money absolutely under a judgment, he is not, by accepting that money, precluded from prosecuting an appeal which does not involve the reversal of that part of the judgment or decree under which he takes the money.

Action by plaintiff as executor of Henry Howard, deceased, to recover from his wife a note and mortgage. The deceased and his wife occupied a homestead and other property which he was desirous of selling, but she refused to join in the conveyance unless the note and mortgage in question, which were for the balance of the purchase price, should be executed in the joint names of herself and husband. They were so executed, and she joined in the conveyance. The plaintiff claimed that the decedent was indebted to various persons, and that the note was required to obtain money to discharge these debts. The trial court found that the note belonged one-half to the decedent and the other half to the defendant, that the creditors were entitled to be paid out of the husband's share, and that the plaintiff, as executor, was entitled to the possession of the note for the purpose of collecting it and dividing the proceeds. Before the entry of the judgment the note had been paid in full to a bank, which held it as collateral security for a debt due from the defendant. The money so paid to the bank was collected by the plaintiff, and one-half thereof paid to the defendant. The plaintiff appealed from that part of the judgment which awarded the defendant one-half of the note, and she appealed from the whole of the judgment.

P. A. Orton, for the plaintiff.

Spensley & McIlhon, for the defendant.

392 BARDEEN, J. The main question arising on this appeal is whether the defendant is entitled to the whole amount of the mortgage given by Stude, or only to one-half, as found by the trial court. Counsel for plaintiff concede that, as against the heirs or next of kin of Howard, the wife, as survivor of her husband, is entitled to the mortgage and the proceeds therefrom.

But it is said Howard left creditors, and that his estate is insufficient to pay them; that it was the intention of Howard to make a gift to his wife; and that she cannot hold the mortgage so long as there are unpaid creditors. The third finding, which is amply supported by [393] the evidence, is, substantially, that Howard owned eighty acres of land, forty of which was his homestead. He desired to sell, but his wife refused to sign the deed so as to cut off and bar her dower and homestead interests. It was then agreed that, if she would sign the deed, the note and mortgage to be given by the purchaser for part of the purchase money should be made payable to Howard and his wife jointly. This deal was consummated October 22, 1891, and Howard died November 19, 1894. Upon these facts the court concludes that, so far as the creditors of Howard are concerned, this mortgage belonged one-half to each—to Mr. and Mrs. Howard. We are not referred to any item of evidence or finding of fact that tends even remotely to support this conclusion.

The status of Mr. and Mrs. Howard with reference to this mortgage must be determined as of the time of the transaction. Section 2068 of the Revised Statutes of 1878 says that "all grants and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy." The succeeding section (2069) says: "The preceding section shall not apply to mortgages, nor to devises, or grants made in trust, or made to executors, or to husband and wife." The doctrines of the common law must therefore be applied to this transaction, as it comes clearly within the exception of the statute. The rule that there may be a joint tenancy of personalty is recognized and upheld in Farr v. Trustees of Grand Lodge A. O. U. W., 83 Wis. 446, 35 Am. St. Rep. 73, and the right of survivorship is maintained. In Draper v. Jackson, 16 Mass. 480, it was decided that a note and mortgage made to husband and wife shall go to the wife, if she survive her husband, and not to the executor of the husband. This was in recognition of the common-law rule that, when an estate is granted to husband and wife, they take by entireties, and not by moieties: Ketchum v. Walsworth [394] 5 Wis. 95; 68 Am. Dec. 49; Brown v. Baraboo, 90 Wis. 151. In the matter of real estate, the husband could not encumber or alienate such an estate so as to prevent the wife, and her heirs after his death, from enjoying it discharged from his debts and engagements. He might, as held in Bennett v. Child, 19 Wis. 362, 88 Am. Dec.

692, alienate his life estate, but could not give title that would be available to his grantee if his wife survived him.

There is no claim in the case at bar that the transaction in question was entered into to defraud creditors. Even were this so, it could not be disturbed under the proof in this case. Forty acres of the land conveyed, and which merged in this mortgage, was the homestead of the parties, and exempt from the claims of all the creditors. There being no proof as to the value of the homestead forty, the court would not be justified in taking any part of this fund to pay creditors. It may well be that the four hundred dollars in cash paid by Stude, at the time of the execution of the deed, to Howard, was the full value of the nonexempt forty. At any rate, without proof to show that this mortgage included the purchase price of nonexempt property, the court would have no authority to apply it to the payment of creditors, if it be admitted the creditors might follow it. The transaction was in no sense a gift to the wife. The release by the wife of her dower and homestead interest was a good consideration to support this arrangement: See Allen v. Perry, 56 Wis. 178. The conclusion of the trial court, that "it must be presumed that the creditors trusted Howard on the strength of this fund, and they are as much entitled to his share as though he had realized his part of the mortgage in his lifetime," was made under a misapprehension of the law. There was nothing unfair or unjust in the transaction; nor does it appear to have been done with any fraudulent design to secrete his property, or put it beyond the reach of creditors.

It may be doubted if there was any legal proof before the 895 court that there were any creditors. The only proof on that subject was the production of some unauthenticated bills alleged to have been filed with the county judge. So far as appears, none of these claims were ever allowed by the county court against Howard's estate. The records of the county court were not identified, except by testimony that they were in the handwriting of the county judge. The mere production of a lot of unauthenticated bills is hardly sufficient to sustain a finding that deceased left unpaid debts. So, under the proof in this case, the court plainly erred in holding that the plaintiff was entitled to any portion of this mortgage fund.

It is said, however, that the defendant waived her right of appeal, because she has accepted the provisions of the judgment made for her benefit. If this be true, the facts disclosed by the

record would be equally fatal to the plaintiff's appeal. He has, quite as much as the defendant, accepted the fruits of the judgment, and, having come here himself, cannot be heard to question the right of his opponent to appeal. But the plaintiff has done more to estop himself. When the defendant sought to settle the bill of exceptions, plaintiff insisted, and at his request the court ordered, that the defendant, as a condition of permitting service of a bill of exceptions, should file a bond conditioned as set forth in the statement of facts. The filing of this bond, in legal effect, restored the plaintiff to his rights substantially as they stood before he paid any money to defendant. Having demanded the bond as a condition for granting relief to defendant, he cannot appear here in very good grace, and urge the objection noted. He comes fairly within the principle decided in Cook v. McComb, 98 Wis. 526, and cases cited, although not within the letter of the decision.

The question of the waiver of the party's right to appeal by acceptance of benefits under an order or judgment has been before this court in a number of cases: Cogswell v. [396] Colley, 22 Wis. 399; Flanders v. Merrimac, 44 Wis. 621; Webster-Glover Lumber etc. Co. v. St. Croix Co., 71 Wis. 317; Hixon v. Oneida Co., 82 Wis. 515; Laird v. Giffin, 84 Wis. 286; Wirth v. Bartell, 89 Wis. 594. And, because there has been some little inaccuracy of statement in some of the cases, it has been thought best that the question be set at rest. In Cogswell v. Colley, 22 Wis. 399, Mr. Justice Paine rightfully holds that, where a new trial has been granted on condition that defendant shall pay the costs of the former trial, plaintiff cannot accept the costs and then maintain an appeal from the order. It is based on the idea that a suitor will not be permitted to assume the inconsistent position of complaining against the order, and at the same time accepting the fruits of it. The learned justice, however, recognizes the distinction which we wish to emphasize; and that is that, where a party is entitled to a certain sum of money absolutely under a judgment, he is not, by accepting that money, precluded from prosecuting an appeal which does not involve a reversal of that part of the judgment or decree under which he takes the money. This we believe to be the true rule, and in accordance with correct ideas of the law. The effort of the courts is to prevent parties assuming inconsistent positions, and "blowing hot and cold" in the same breath. If the benefit received is dependent upon, or was granted as a condition of, the order or judgment attacked, clearly the party ought not to be

permitted to carry on his warfare. But if the conditions of the order or judgment under which he is granted a favor are independent and separable from those sought to be overturned, there seems to be nothing in reason or justice to prevent him from seeking to vindicate in the appellate court the right denied him in the trial court. This right was sanctioned in New York in the early case of Clowes v. Dickenson, 8 Cow. 328, and has since been followed in that state by an unbroken line of decisions: Benkard v. Babcock, 27 How. Pr. 391; Higbee v. Westlake, 14 N. Y. 281; [397] Farmers' Loan etc. Co. v. Bankers etc. Tel. Co., 109 N. Y. 342; Mellen v. Mellen, 137 N. Y. 606.

In Flanders v. Merrimac, 44 Wis. 621, the plaintiff applied for a change of venue. The court granted the application on condition that he pay certain costs. He paid the costs, and took the order changing the place of trial; and Taylor, J., says: "And it would seem equally clear that the applicant, having taken the benefit of the order conditioned upon the payment of costs, cannot now appeal and get rid of the condition." It will be seen that emphasis is laid upon the conditional character of the relief granted, and that, having accepted the order upon the terms imposed, he has waived his right to appeal. This case is cited to sustain the decision of this court in Webster-Glover etc. Co. v. St. Croix Co., 71 Wis. 317. The action was to set aside certain taxes. The court found that a part of the taxes were valid and a part invalid, and entered an order requiring the plaintiff to pay into court the valid tax, and rendered judgment setting aside the invalid tax. The defendant claimed that the entire tax was valid. The money paid into court was paid over to defendant. The defendant then appealed, and sought to have the judgment reviewed. The decision was to the effect that, having accepted this money, the defendant was precluded from pursuing its appeal, on the ground that to allow it to do so would "be contrary to that just principle which forbids one from claiming under, and at the same time repudiating, any instrument"; also, citing the Cogswell case. The judgment of the trial court provided that the payment by plaintiff of the sum specified should be in full payment, satisfaction, and discharge of all taxes upon its lands. Perhaps this decision can be supported upon the ground that the acceptance of this money was an acceptance by defendant of the conditions of the judgment; but, independent of the conditional character of [398] the judgment, no good reason is perceived why the defendant might not have received the amount adjudged absolutely to be its due, and still have sought

to secure the tax decreed to be void. The provision of the judgment as to the taxes decreed to be valid and those declared invalid were separable and independent, and on the defendant's appeal only those parts of it put in peril were those that related to the invalid tax. It is only when the appellant stands in the attitude of holding the fruits of the judgment to which he may not be entitled if his appeal succeeds that the rule stated applies. Alexander v. Alexander, 104 N. Y. 643. In this view, the headnote to Laird v. Giffin, 84 Wis. 286, is somewhat misleading. The conditional character of the judgment is noted in the opinion, but not recognized or stated in the syllabus. So what is said in Hixon v. Oneida Co., 82 Wis. 515, on page 530 of the opinion, must be read in view of what we have heretofore said on this subject. Wirth v. Bartell, 89 Wis. 594, may be consulted with profit, as illustrating the view we have taken.

The application of these principles to the case at bar, independent of the attitude of the parties to each other, as before noted, leads us to the conclusion that the defendant has not waived her right of appeal. So far as her case is concerned, and upon her appeal, she stands in no peril of losing what she has received. Under the judgment rendered, she is entitled absolutely, by independent and separable provisions, to the money she has received. The money paid her was not paid under any circumstances of accord and satisfaction of the judgment, or under any conditions of the judgment that induced the plaintiff to make such payment. The view we have taken renders necessary a reversal of those portions of the judgment giving the plaintiff any right to the mortgage fund. If it be true that plaintiff has collected the mortgage debt, the new judgment should be in such form [399] as to protect the defendant's interest, and secure payment to her of the entire amount unpaid, less the amount retained by the bank in payment of defendant's note.

By the Court. Those portions of the judgment of the circuit court above alluded to are reversed, and the balance of the judgment is affirmed, and the cause is remanded with directions to enter judgment for the defendant in accordance with this opinion.

HUSBAND AND WIFE AS JOINT TENANTS—RIGHT OF SURVIVORSHIP.—A husband and wife may take real estate as joint tenants or as tenants in common, if the instrument creating the title use apt words for the purpose: Thornberg v. Wiggins, 135 Ind. 178; 41 Am. St. Rep. 422, and note. Under a joint deed to a husband and wife, they take by entireties, and the estate thus created with

the right of survivorship, is not destroyed nor affected by the divorce of the grantees: Appeal of Lewis, 85 Mich. 340; 24 Am. St. Rep. 94. Under a conveyance to a husband and wife, if the wife survives, she takes the whole estate, and not as tenants in common with creditors of the husband levying upon the land in his lifetime: Brownson v. Hull, 16 Vt. 309; 42 Am. Dec. 517.

APPEAL — WAIVER OF RIGHT TO.—The general rule is, that a party in whose favor a judgment is rendered cannot claim the benefit of it, and at the same time object to it as being for too small a sum. So a party accepting payment of a judgment or order, or any benefit under it, cannot appeal from it: Extended note to Clark v. Ostrander, 13 Am. Dec. 548. But the right of appeal is not waived by accepting a benefit under a judgment which the appellate court has power to modify so as to make it more favorable to the appellant, without reversing or modifying that part of it in his favor, and of which he has secured the benefit. In such case, the appeal can be taken only from the adverse portion of the judgment: Tyler v. Shea, 4 N. Dak. 377; 50 Am. St. Rep. 660.

CARROLL *v.* CHICAGO, BURLINGTON & NORTHERN RAILROAD COMPANY.

[99 WISCONSIN, 399.]

NEGLIGENCE—WHEN PRESUMED FROM THE HAPPENING OF AN ACCIDENT.—If a railway corporation is accustomed to pay its employés from an open window, and they are accustomed, when advancing to the window to be paid, to reach their hands partially through the opening or to rest them upon the ledge, and it appears that the window has a catch and would not fall if it were properly set, and on one occasion it did fall and injured a person who was there to receive the pay of an employé, the presumption arises from such accident that there was negligence in failing to properly set such catch. The testimony of a witness that he set such catch is not conclusive upon the jury.

NEGLIGENCE—PERSON INJURED, WHEN NOT AN EMPLOYÉ.—If a person goes to a window to receive pay due to a discharged employé of a corporation, and is there injured through the negligence of another employé, the person so injured is not a coemployé, and hence is not precluded from recovering for such injury.

Losey & Woodward and Andrew Lees, for the appellant.

F. E. Withrow and Doherty & Baldwin, for the respondent.

402 WINSLOW, J. The defendant's contention is, that there is no evidence in the case showing negligence, and that the accident was not one from the happening of which, alone, negligence can be inferred. The evidence shows beyond dispute that the plaintiff came rightfully to the window to present the order for Malloy's pay, pursuant to an express invitation by the defendant's employé, Dolson, and in accordance with the custom estab-

lished by the defendant, of paying off its employes through this open window. It certainly would be very natural for persons advancing to the window for such purpose to reach their hands partially through the open window, or rest them upon the ledge, and the testimony showed that such acts were frequent and customary. Under such circumstances, the verdict of the jury, to the effect tht such an injury as happened to the plaintiff ought reasonably to have been anticipated, is based upon sufficient testimony. The evidence also showed without contradiction that the window and the catch were both in perfect condition, and that the window had never been known to fall before or since, and would not fall if the catch were [403] properly set. These facts clearly show that the fall of the window must have resulted from Dolson's failure to set the catch, and makes the accident one where a presumption of negligence is raised from the mere fact of the happening of the accident itself. The evidence being conclusive that the window and the catch were in good order, it follows that the negligence so presumed must have been in the failure to properly set the catch: Cummings v. National Furnace Co., 60 Wis. 603. Quoting from the sentence approved in that case: "When the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." It is true that the agent, Dolson, testified that he set the catch, but we do not regard this testimony as conclusive upon the jury upon this question. The answers to the special questions are therefore supported by sufficient evidence.

There is a further claim made that Carroll must be considered a coemployé of Dolson. The evidence shows, however, that the plaintiff was not in the employ of the defendant, and that Malloy had at some previous time been an employé, but had quit prior to the time of this accident; so this claim necessarily falls to the ground.

It was suggested that the answers to the special questions do not find negligence, but only that Dolson did not fasten the window, and that the failure to fasten the window is not necessarily negligence. This was not a special verdict, but the court of its own motion submitted to the jury certain particular questions of fact in addition to the general verdict: Rev. Stats. 1878, sec. 2858. In such case there is no requirement that the

special questions submitted shall cover all the issues in the case. There being a general verdict, it necessarily covers all the issues, and there are no exceptions to [404] the charge, and no additional instructions were asked by the defendant.

In any view which we have been able to take of the case, we have been unable to find any error.

By the Court. Judgment affirmed.

NEGLIGENCE—PRESUMPTION OF—WHEN ARISES.—Negligence is presumed from the happening of an accident, if injury occurs in consequence of something which the defendant did or did not do, and which it was his duty to do, or not to do: Note to Mexican Cent. Ry. Co. v. Lauricella, 47 Am. St. Rep. 107. There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care: Snyder v. Wheeling Electrical Co., 43 W. Va. 661; 64 Am. St. Rep. 922. Accidents as evidence of negligence is the subject of the monographic note to Philadelphia etc. R. R. Co. v. Anderson, 20 Am. St. Rep. 490; Chicago Street Ry. Co. v. Rood, 163 Ill. 477; 54 Am. St. Rep. 478, and note.

MASTER AND SERVANT—WHEN RELATION EXISTS.—To constitute a servant, there must be some contract or some act on the part of the master, which recognizes the person as a servant, either express or implied: Rhodes v. Georgia R. R. etc. Co., 84 Ga. 320; 20 Am. St. Rep. 362. Mere volunteers are not ordinarily deemed servants: Note to Rhodes v. Georgia R. R. etc. Co., 20 Am. St. Rep. 368. See Evarts v. St. Paul etc. Ry. Co., 56 Minn. 141; 45 Am. St. Rep. 460, and note.

BECKER *v.* LA CROSSE.

[99 WISCONSIN, 414.]

MUNICIPAL CORPORATIONS.—The acts of the officers of a municipal corporation cannot bind it, unless they are within the powers expressly granted it by its charter, or fairly implied in or incident thereto, or indispensable to the declared objects and purposes of the corporation.

MUNICIPAL CORPORATIONS—POWERS GRANTED TO BY ANOTHER STATE.—A municipal corporation created and existing in one state has no right or power to accept a privilege granted to it by the legislature of another state to construct and maintain a highway in the latter. Hence the municipality cannot be held answerable for injuries caused by defects in, or want of repair of, such highway.

Action to recover for injuries received by the plaintiff while riding on a highway in the state of Minnesota near the city of La Crosse, Wisconsin, under a claim that the injuries were

due to the negligence of that city in not maintaining such highway in proper condition and repair. The statutes of Wisconsin, enacted in 1889, authorized the defendant to construct a bridge across the Mississippi river to some point in the county of Houston, Minnesota, with all necessary approaches. In the same year the latter state granted to the defendant the right to construct and maintain a wagon road from a designated point in Houston county to the line between the two states. The statute granting this right provided that the defendant should be liable for all damages sustained by any person traveling on this road caused by its improper construction or want of reasonable repair. Judgment for the plaintiff.

Martin Bergh, city attorney, and Bleekman, Bloomingdale & Bergh, for the appellant.

Higbee & Bunge, for the respondent.

417 BARDEEN, J. From the statement of the facts involved in this litigation, it will be observed that the accident to plaintiff happened on an embankment, some little distance west of the west end of the bridge across the Mississippi river, outside of the corporate limits of the city of La Crosse, and beyond the limits of this state; and it is insisted that the city of La Crosse built and maintained the road in question without any charter or legislative authority from the legislature of this state. It is not claimed that the charter gives the city any authority or power in the premises. The only power granted by the legislature is such as is contained in chapter 37 of the Laws of 1889. Dillon on Municipal Corporations, fourth edition, section 89, says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." This declaration of the law meets with express approval in Trester v. Sheboygan, 87 Wis. 496. It is also a rule of law as universal in its application that the agents, officers, or even the city council, of a municipal corporation cannot bind the corporation by the assumption of powers beyond those granted by the sovereign authority, except within the limitations above stated. It would seem like a truism to state that the legislature cannot grant authority to a municipal

corporation to assume obligations or to charge itself with permanent duties to be performed outside of the state limits.

[418] Section 1, article 9, of the constitution declares that "the state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to the state, or any other state or territory now or hereafter to be formed and to be bounded by the same." The boundary line between this state and Minnesota is the main channel of the Mississippi river: Const., art 2, sec. 1. In the exercise of its "concurrent jurisdiction" over the Mississippi river, this state saw fit, by chapter 37 before mentioned, to grant to the city of La Crosse the right to construct a bridge across the river to some point in Minnesota, with all necessary approaches thereto. Admitting that this authority was properly conferred, for the purposes of this suit, the act referred to did not and could not grant the right to the city to build and maintain a highway two and one-half miles long, on the bottom lands of the river in the state of Minnesota. There is, therefore, nothing in the charter of the defendant city, or in chapter 37, giving it authority to keep up, or making it its duty to maintain, the highway upon which the plaintiff was injured.

The question then recurs, Had the city the authority or right to accept the privilege granted it by the state of Minnesota? We have been referred to no case, and after careful search we are unable to find one, in which this precise question has been determined. Such a decision may be in the books, but the industry of both counsel and court has been unavailing to find it. While it may be admitted that the maintenance of this bridge and highway may be of material advantage to the city and may add largely to the commerce of its inhabitants, it cannot be said to be of such paramount importance as to require any stretch of legal principles to sustain that right. It is true that municipal corporations are often granted proprietary or private rights, which they may exercise under the same perils and obligations as a private person; but those rights can only come [419] from the source that gave it corporate existence. By the acceptance and exercise of these rights, the corporation assumes the same obligations and responsibilities, and the same duty to so exercise them as not to invade the rights of others, as fall upon private persons. The distinction between the rights which the corporation possesses in its governmental or public character, and those which fall to it in its proprietary or private character, originated in the courts, to promote justice, and has been frequently ap-

plied to escape technical difficulties, in order to hold such corporations liable to private actions: 1 Dillon on Municipal Corporations, sec. 67.

The general doctrine is clear that such corporations cannot usually exercise their powers beyond their own limits. The right to exercise extraterritorial powers can only arise by express grant of authority, as indicated in Mayor v. Moran, 44 Mich. 602, or by necessary implication from other powers granted, as is pointed out in Coldwater v. Tucker, 36 Mich. 474; 24 Am. Rep. 601. And the powers so exercised must be directly within the range of corporate purposes. Considerations of local policy, no doubt, induced the legislature to grant the city of La Crosse the right to build the bridge mentioned. The movers in this enterprise evidently appreciated the serious difficulties attending the erection and management of expensive public works situated partly in this state and partly in Minnesota. It was to remove, in some degree, these difficulties that the legislation referred to was obtained from the state of Minnesota. The corporation of La Crosse exists only by the grace of the legislative grant of the state. As before suggested, it possesses no power and can assume no obligations except such as may come from the original source. To permit it to accept rights, and to assume duties, beyond the power of its creator to enforce or to regulate, would be an innovation we are not prepared to sanction. From the very necessities of the situation, it would have no power it regulate or protect its erections in a foreign jurisdiction. [420] The noted case of Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669, and New York v. Bailey, 2 Denio, 433, illustrates some of the complications that might arise in that regard. To permit the city, no matter how desirable it may be, to expend its money, and to obtain rights and privileges, beyond its own limits, and beyond the limits over which its creator has jurisdiction, would be unwise and dangerous, to say the least, and against public policy. Its acts in this regard being ultra vires, the municipality cannot be held liable therefor, or for failure to perform such acts, to the injury of others: Tiedeman on Municipal Corporations, sec. 338. And see Trester v. Sheboygan, 87 Wis. 496; Cavanagh v. Boston, 139 Mass. 426; 52 Am. Rep. 716.

In arriving at this conclusion, we have not overlooked the rule laid down in the celebrated case of Bank of Augusta v. Earle, 13 Pet. 519, to the effect that a corporation created by one sovereignty may, by comity, do business, hold property, and sue in the courts of other sovereignties of the Union, nor the

line of decisions that hold that a city may take and hold the title to property outside of its corporate limits. In the first instance, the rule must be confined to trading or commercial corporations in contradistinction to municipal corporations; and, in the second line of cases referred to, the decisions are based upon the rule that the right to own property is not a sovereign right, and that the title to property may vest in the municipality even though it may not exercise the rights of sovereignty over it: Lester v. Jackson, 69 Miss. 887; In re New York, 99 N. Y. 569. And see McDonogh v. Murdoch, 15 How. 367. We therefore hold that the city of La Crosse was without authority, under its charter or the law of this state, to accept privileges or assume duties and obligations to be performed outside of the limits and beyond the jurisdiction of this state, and, owing no duty to the plaintiff with reference to this highway, cannot be held liable in this action.

The cases of The Giovanni v. Philadelphia, 59 Fed. Rep. 421 303, and Guthrie v. Philadelphia, 73 Fed. Rep. 688, cited to support the plaintiff's recovery, are quite unlike the case at bar. We have no quarrel with the proposition that, when a municipal corporation engages in things not municipal in their nature, it acts as an individual, and is responsible accordingly. In each of these cases the corporation defendant engaged in the performance of duties strictly within its chartered powers, and the recovery against it was based entirely on that ground.

There is another feature of this case that raises a most serious question, should the liability of the city to keep up this highway be conceded. The road in question was twenty feet in width on the top, in perfect condition, and, so far as the evidence shows, with ample room for the accommodation of the public, in view of its use. The only imperfection in the highway is the alleged failure to erect and maintain guards or barriers along this embankment. The city is not an insurer of travelers on its streets. It is only required to keep its highways in a reasonably safe condition for travel. Here the way was broad and ample for the passage of teams, and it may reasonably be claimed, as a matter of law, that this highway met all the conditions required in such cases. That question, however, we leave for future determination.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

MUNICIPAL CORPORATIONS—POWERS—ACTS OF OFFICERS.—Municipal corporations have such capacities and powers, and such only, as are expressly granted, and such as may be implied as essential to carry into effect those expressly granted: Markley v. Mineral City, 58 Ohio St. 430; 65 Am. St. Rep. 776. They can do no act, nor make any contract, nor incur any liability, not thus authorized: Winchester v. Redmond, 93 Va. 711; 57 Am. St. Rep. 822, and note. Those who contract with municipal corporations are bound to know the extent of the powers of their officers: Sutro v. Pettit, 74 Cal. 332; 5 Am. St. Rep. 442.

STACY *v.* LA BELLE.

[99 WISCONSIN, 520.]

INDIANS—JURISDICTION OF STATE COURTS OVER.—In the absence of any treaty or act of Congress to the contrary, a state court has jurisdiction of an action by a white man against an Indian belonging to, and residing with, a tribe on a reservation within the state, to recover moneys alleged to be due from him on account of goods sold and delivered at such reservation.

Eugene M. Wescott and F. M. Guernsey, for the appellant.

G. C. Dickinson, for the respondent.

520 CASSODAY, C. J. This action is to recover the balance of two hundred seventy-nine dollars and sixty-five cents due on account for goods, wares and merchandise sold and delivered by the plaintiffs, as copartners, to the defendant, between July 1, 1888, and October 17, 1889. The defendant answered, and alleged, in effect, that he bought the goods, wares and merchandise as partner with another, and that he was an Indian belonging to the Menominee tribe; that he resided with the tribe upon the reservation; and that the same was under the charge, direction, and control 521 of the United States Indian agent, and prayed that the action be abated and dismissed. The cause was thereupon referred to a referee to hear, try, and determine; and, upon the cause being tried before the referee, he found, as matters of fact, in effect, that there was due to the plaintiffs from the defendant the amount claimed, with interest from October 17, 1889; that the defendant was an Indian, and belonged to the tribe, and resided upon the reservation; that there was nothing in any treaty with the tribe, nor any act of Congress, to prevent the state courts from taking jurisdiction; and hence that the plaintiffs were entitled to judgment.

The trial court modified the findings of the referee, but not essentially as to any question of fact, but found more in detail

as to the status of the defendant as an Indian, and to the effect that the tribe held the reservation by treaty for their exclusive use and occupancy; that the same was under the charge, direction, and control of an Indian agent of the United States; that the goods and merchandise mentioned were furnished, sold, and delivered to the defendant by the plaintiffs on the reservation while Stacy was engaged in business as Indian trader on the reservation under and by virtue of the permit and license issued by the United States to him, as such Indian trader; that the defendant was a Menominee Indian, and a member of the tribe, born upon the Menominee reservation, and enrolled as such; that his mother lived upon the reservation, and was a member of the tribe; that his father was a white Frenchman, and not a member of the tribe. As conclusions of law, the court found, in effect, that the treaties and acts of Congress precluded the state courts from taking jurisdiction in a case like this, and that the trial court had no jurisdiction over the defendant in this action, and ordered judgment against the plaintiff, dismissing this action, but without costs. From the judgment entered thereon accordingly, the plaintiff brings this appeal.

522 Undoubtedly, Congress has power "to regulate commerce with the Indian tribes": U. S. Const., article 1, section 8. Under this clause of the constitution, it must be conceded that Congress has power to regulate all traffic and commercial intercourse among or with Indians, even when the tribe is located wholly within the limits of a single state: Brown v. Maryland, 12 Wheat. 419; United States v. Holliday, 3 Wall. 407; United States v. Mayrand, 154 U. S. 552. In making such regulations, Congress may, undoubtedly, give to the federal courts exclusive jurisdiction. State courts may be precluded from taking jurisdiction in such cases, not only by congressional enactments, but by treaty between the particular tribe and the federal government; since such treaty, when made, under the constitution, becomes a part of "the supreme law of the land": U. S. Const., article 6; Worcester v. Georgia, 6 Pet. 515; United States v. Forty-three Gallons of Whisky, 93 U. S. 188; Ex parte Crow Dog, 109 U. S. 556; Farrington v. Wilson, 29 Wis. 383. But it does not follow from such mere grant of such powers to the federal government that the state courts are precluded from taking jurisdiction in such cases, as seems to have been held by the trial court. On the contrary, the supreme court of the United States has frequently held, as was declared in the Federalist before the adoption of the constitution, in effect, that

the powers delegated to the federal government were exclusive of the powers reserved to the states in only three classes of cases. One class is where the particular power granted is therein expressly stated to be exclusive; another class is where the power is granted in one clause, and then in some other clause or clauses the states are expressly prohibited from exercising the like authority; and the other class is where the power granted is, inherently and absolutely, repugnant to the exercise of a like power by the states—as, for instance, powers which cannot be fully exercised within the limits of a single state, like the power "to regulate commerce with foreign nations and among the several states": No. 31 Dawson's (No. 32) [523] Federalist; Cooley v. Board of Wardens, 12 How. 318; Gilman v. Philadelphia, 3 Wall. 713; Henderson v. Mayor, 92 U. S. 259; Mobile Co. v. Kimball, 102 U. S. 691; Leisy v. Hardin, 135 U. S. 100, 108, 109.

Manifestly, the case at bar does not belong to either of those classes. In this last case the distinction is clearly made by Chief Justice Fuller. Acting upon the principles suggested, Congress has expressly provided that "the jurisdiction vested in the courts of the United States," in the eight particular classes of cases therein mentioned, should "be exclusive of the courts of the several states." One of the classes of cases so mentioned is, "Of all crimes and offenses cognizable under the authority of the United States"; and another is, "Of all suits for penalties and forfeitures incurred under the laws of the United States." United States Revised Statutes, section 711. With certain exceptions, those statutes provide that "the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country": United States Revised Statutes, section 2145. But that section "shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively": United States Revised Statutes, section 2146. The exclusive jurisdiction of the federal courts was further extended to certain other crimes committed by Indians by the act of March 3, 1885: 23 Stats. at Large, 385, c. 341, sec. 9. For a construction of these statutes, see In re Wilson, 140

U. S. 575; In re Mayfield, 141 U. S. 107; Smith v. United States, 151 U. S. 50; Westmoreland v. United States, 155 U. S. 545. In speaking of the statute as it stood before the act of 1885, Mr. Justice Miller said: "It does not interfere [524] with the process of state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation": United States v. Kagama, 118 U. S. 383. It has frequently been hold that, except in so far as the jurisdiction of state courts has been restricted by federal legislation or treaty, they may take jurisdiction even of crimes committed by Indians: State v. Doxtater, 47 Wis. 278; State v. Harris, 47 Wis. 298; People v. Ketchum, 73 Cal. 635.

Counsel has not cited any federal statute or treaty which prohibits state courts from taking jurisdiction of an action on contract against an Indian, as in the case at bar, and we find none. The plaintiff Stacy was not an Indian agent, but he was licensed and expressly authorized to sell goods to Indians as an Indian trader: U. S. Rev. Stats., secs. 2128-2132. The goods for which this action was brought were therefore properly sold to the defendant. In the absence of any federal statute or treaty to the contrary, and upon the principles stated, we must hold that a state court may take jurisdiction of an action on contract in favor of a white man, and against an Indian belonging to a tribe and a particular reservation: Stokes v. Rodman, 5 R. I. 405; Swartzel v. Rogers, 3 Kan. 374; Ingraham v. Wa d, 56 Kan. 550; Godfroy v. Scott, 70 Ind. 259; Ke-tuc-e-mun-guah v. McClure, 122 Ind. 541; Gho v. Julles, 1 Wash. Ter. 325. In one of these cases it was held that "the fact that the lands of the defendant, who is an Indian, are not liable to levy and sale under a judgment, is no ground for refusing a judgment against him": Gho v. Julles, 1 Wash. Ter. 325.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiffs, and against the defendant, in accordance with the findings of the referee.

JURISDICTION—RIGHTS OF INDIANS.—A member of an Indian tribe, born in the United States, is not born subject to its jurisdiction, and is not a citizen: Extended note to Ludlam v. Ludlam, 84 Am. Dec. 211. Where, by the laws of the Indian territory, the remedy to recover for a wrong done within that territory is confined to the nearest United States court, the court of another state has no jurisdiction to entertain an action for such wrong: Holdeman v. Pond, 45 Kan. 410; 23 Am. St. Rep. 734. As to the effect of treaties as law, see extended note to Yeaker v. Yeaker, 81 Am. Dec. 536.

McFarlane *v.* Louden.

[99 Wisconsin, 620.]

PRESUMPTION AS TO THE DATE OF THE EXECUTION OF A DEED.—A deed is presumed to have been executed on the day it bears date, although acknowledged at a later day, as appears by the certificate of such acknowledgment.

A DEED ABSOLUTE ON ITS FACE may be shown to be a mortgage.

FRAUDULENT TRANSFERS.—A DEED ABSOLUTE ON ITS FACE, but intended as a mortgage, is not fraudulent as against creditors of the grantor for not expressing on its face the true nature of the transaction, where the grantee did not conceal its character nor claim an absolute title thereunder.

FRAUD.—THE FAILURE TO RECORD A CONVEYANCE intended as a mortgage for several months after its execution does not make it fraudulent, where there was no agreement to keep it from the records.

Reed & Reed, for the appellants.

Titus & McIntosh, for the respondent.

622 BARDEEN, J. Unless we can say that the findings of fact of the circuit court should be disturbed, its conclusions of law must be sustained. It is insisted by the defendants that the court should have found that the deed of February 5th was executed subsequent to the date of their attachments. This contention is based upon the most vague and unsatisfactory inferences. In order to warrant this court in setting aside the findings of the court below on questions of fact, the evidence should be such, at least, as to enable us to see with some degree of clearness that the finding is wrong: Magee v. Mississippi River Logging Co., 95 Wis. 377; Catura v. Kleiner, 95 Wis. 378; Pomeroy v. Heddles, 95 Wis. 455. The only facts of any weight relied upon to upset the finding in question are that the deed, having been executed in Minnesota, had no certificate of the official character of the notary upon it, until after the date of the attachments, and that Mr. Paine, the officer of the bank who drew the deed, did not remember positively just when the deed was executed. He said he supposed it was drawn upon the date which appears upon it. The presumption is, that the instrument was 623 made on the day it bears date: Jones on Evidence, sec. 45; 19 Am. & Eng. Ency. of Law, 50; see Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772.

The fact that the certificate of the clerk to the deed is of subsequent date to that of the deed itself is perfectly consistent with good faith. That it was of a subsequent date to the attach-

ment, at most, gives rise to a mere surmise, of little weight in overcoming the presumption stated and the express finding of the court.

It is further urged that the undisputed facts found show fraud. It will be noted that there is no claim but that Mrs. McKenzie was justly indebted to the bank; nor is it stated that there is any evidence of fraudulent intent on the part of either, except such as is inferable from the transaction itself. The court expressly finds that no such intent existed. The fact that the deed was withheld from record from February to May is of no special significance, as the debts which the defendants are seeking to enforce were contracted long prior to the execution of the deed. There was no agreement to keep it from the records, so as to give the debtor a false credit; and the fact that it was not recorded until after the attachments, under the circumstances in proof, becomes unimportant. For the purpose of this case, it may be admitted that where one takes, as security for a previous debt, a deed absolute in form, and conceals the true nature of the conveyance, claiming title thereunder, the deed will be treated as fraudulent as against a judgment creditor of the grantor. But there is no evidence here that the bank was claiming the title to this land except as security. Mr. Louden was informed that, if he would pay what Mrs. McKenzie owed, he could have a deed of all the property the bank held. There is no proof that the debtor was insolvent, and it affirmatively appears that she had other property at the time the deed was executed. It is settled doctrine with most courts, as well as in this state, that a deed absolute on its face may be shown to be a mortgage: Hoile v. Bailey, 58 Wis. 434; Phelan [624] v. Fitzpatrick, 84 Wis. 240. And while such a conveyance may be a badge of fraud, it will be upheld where no fraud is intended. Such a conveyance has never been hold fraudulent, in this state, per se, so far as we are aware, and, when it is shown that the transaction is bona fide, we see no reason why it may not be sustained. The question of good faith having been litigated and affirmatively established in this case by the findings of the court, we cannot disturb such conclusion upon any such vague and unsatisfactory inferences as are here urged for our consideration.

The objection to the finding as to the payment of taxes must also be overruled. There is some evidence to support it, although perhaps not the best. After Mr. Paine had given some testimony about the payment of taxes, defendant's counsel moved to strike out all evidence as to the payment of taxes on

the ground that it was not the best evidence. The record fails to show any ruling of the court or any exception. The witness afterward testified that he had paid one hundred and thirty dollars as taxes, and the court allowed the claim at this amount. It would, of course, have been more satisfactory if the tax receipt had been produced and offered in evidence. The case of Fuller v. Griffith, 91 Iowa, 632, is cited as decisive against the plaintiff. An examination of the facts in that case discloses, as the court found, that, up to the very last moment, both the grantor and grantee in the deed claimed that it was an absolute conveyance, and not given as security.

By the Court. The judgment of the circuit court is affirmed.

DEEDS—EXECUTION—PRESUMPTION AS TO DATE.—A deed will be presumed to have been made on the day of its date, when it is found in the hands of the grantee, having on its face the evidence of its regular execution; and this presumption will be greatly strengthened if it is accompanied by an acknowledgment of the same date in proper form before a proper officer: Cover v. Manaway, 115 Pa. St. 338; 2 Am. St. Rep. 552, and note.

DEEDS—WHEN CONSTRUED AS MORTGAGES.—A deed absolute in form is in fact a mortgage, when given to secure the payment of money, although the parties may have agreed that, upon default in payment, the deed should become absolute: State Bank v. Mathews, 45 Neb. 659; 50 Am. St. Rep. 565, and note. But the presumption of law is, that an instrument is what on its face it purports to be: Mahoney v. Bostwick, 96 Cal. 53; 31 Am. St. Rep. 175, and note.

FRAUDULENT CONVEYANCES.—A deed absolute on its face, but intended as mere security for a debt, is fraudulent and void as against the creditors of the grantor: Bernhardt v. Brown, 122 N. C. 587; 65 Am. St. Rep. 725, and note. See McCulloch v. Hutchinson, 7 Watts, 434; 32 Am. Dec. 776; North v. Belden, 13 Conn. 376; 35 Am. Dec. 83.

ROCK *v.* COLLINS.

[99 WISCONSIN, 630.]

GARNISHMENT — AMENDING ANSWER. — A garnishee who, in his original answer, denies all liability, may, at the close of the testimony at the trial, be permitted to amend his answer so as to admit possession of certain property under a chattel mortgage, and that he holds a conveyance of other property as security for a debt.

PRACTICE—GARNISHMENT.—If an amended answer of a garnishee is not verified, its want of verification is waived by failing to object thereto.

PARTNERSHIP — CHATTEL MORTGAGE — POWER OF ONE PARTNER TO EXECUTE.—One partner may alone and without the knowledge of his copartners execute a chattel mortgage of the firm property to secure its debt.

CHATTEL MORTGAGE—MISDESCRIPTION OF DEBT.—If a debt, to secure which a chattel mortgage is given, is incorrectly described as to amount, but correctly as to date, the mortgage is not on that account invalid.

CHATTEL MORTGAGE ON PARTNERSHIP PROPERTY for the purpose of securing a firm debt and also an individual debt due from one of the partners is void as to the individual debt and valid as to the partnership obligation.

FRAUDULENT TRANSFERS—DEED ABSOLUTE IN FORM INTENDED ONLY AS SECURITY.—The fact that a deed absolute in form is taken as security, instead of a mortgage, is to be considered in determining whether fraud was intended, but it must be upheld if shown to have been given in good faith and without any intent to defraud.

Garnishment under execution. The garnishee by his original answer denied all liability. At the trial he was permitted to file an amended answer, which, in addition to denying liability, alleged that he held certain property under a chattel mortgage, and had a deed of standing timber executed as collateral security. The property held by the garnishee belonged to the firm of Erickson & Collins, consisting of J. E. Erickson and Mike Collins. Certain defects were claimed to exist in the chattel mortgage, but they sufficiently appear from the opinion of the court. Judgment in favor of the garnishee, and the defendant appealed.

C. R. Fridley and A. T. Rock, for the appellant.

Catlin, Butler & Lyons, for the respondent.

636 WINSLOW, J. The evidence in this case was voluminous, and it is not deemed necessary to review it in this opinion. It is sufficient to say that there was ample evidence to sustain the findings of the trial court, and hence the questions to be discussed will be simply questions of law.

1. A question of practice is raised. The original answer of the garnishee defendant consisted of a denial of liability under the statute. Upon the trial, and at the close of the plaintiff's testimony, the garnishee defendant was allowed to interpose an amended answer, against a general objection by the plaintiff, setting forth the facts as to the holding of the collateral securities. This answer was not verified, but no objection was made upon that ground, nor was any surprise claimed; and in fact it is difficult to see how any claim of surprise could be made, because the transactions set up in the amended answer were the very transactions upon which the plaintiff's claim of liability was founded. We can see no error in this ruling. Such amendments are frequently allowed at the circuit, and their allowance rests in the sound discretion of the trial court. If the objec-

tion that the amended answer was not verified was relied on, it should have been made at the time of the filing of the answer. Not being made at that time, it was waived: Grace v. Newbre, 31 Wis. 19.

2. It is objected that the chattel mortgage upon the logging outfit was invalid, because made by one partner alone, without the knowledge of his copartner. The general power of one partner to pay firm debts out of firm property in the ordinary course of business is well established; and, if he [637] may pay a debt, no good reason is perceived why he may not secure its payment by pledging or mortgaging firm property. It has been held by this court that one partner may, in the absence of his copartner, mortgage the firm property to secure a bona fide partnership debt: Hage v. Campbell, 78 Wis. 573; 23 Am. St. Rep. 422; also, that one partner may make a valid voluntary assignment of the personal property of the firm for the benefit of creditors where the other partner has absconded: Voshmik v. Urquhart, 91 Wis. 513. There has been some diversity of opinion upon the question whether one partner may, without the consent of his copartner who is accessible for consultation, mortgage the entire firm property to secure a firm debt, when the effect of the mortgage would be to practically terminate the business of the firm, although the weight of opinion seems to favor the validity of such a mortgage: Jones on Chattel Mortgages, sec. 46. But it is certain that the subsequent acquiescence or consent of the other partner would remove all question as to the validity of the mortgage: Jones on Chattel Mortgages, sec. 46. Such acquiescence was proven in the present case.

3. It is claimed that the mortgage was void, because the note which was given to secure was not correctly described, and because it was intended to secure thereby the individual debt of Mike Collins as well as the firm debt. The note held by the garnishee defendant was for twelve hundred dollars, and was dated July 2, 1894; but it was described in the chattel mortgage as a note for fourteen hundred dollars, bearing date July 2, 1894. The evidence shows beyond question that the twelve hundred dolllar note was the only note held by the garnishee, and that it was intended to be secured by the mortgage. The difference in amount arose from the fact that there was about fifty dollars of interest due upon it, and the parties attempted to include in the mortgage the one hundred and fifty dollar indebtedness of Mike Collins. Thus, it appears that the correct date was given, but not the correct amount. It is not like the

case of Follett v. Heath, 15 Wis. 601, where the [638] description of the debt was false in every respect, but rather like the case of Paine v. Benton, 32 Wis. 491, where the description was correct in some particulars and false in others, and where it was shown by the proof that the note in evidence was the note intended to be secured. "It is sufficient if the note is so far described that it appears with reasonable certainty to be the note intended to be secured: Weber v. Illing, 66 Wis. 79. The fact that the individual indebtedness of Mike Collins of one hundred and fifty dollars was attempted to be covered by the mortgage, and that the amount of the mortgage was thus improperly swelled to fourteen hundred dollars, was undoubtedly evidence tending to show fraud, but did not necessarily render the mortgage fraudulent in law. The inference of fraud may be repelled by the circumstances surrounding the transaction: Bradley Co. v. Paul, 94 Wis. 488. In the present case, the trial court was of the opinion that the inference of fraud was overcome by the proofs, and we cannot say that such conclusion was wrong. The mortgage is only security for the amount of the firm debt secured thereby, and, as to the individual debt of Mike Collins, it is not a lien: Cribb v. Morse, 77 Wis. 322.

4. The garnishee defendant took an absolute deed of certain timber, as additional security for the payment of his debt; and it is now claimed that the fact that he took a deed, instead of a mortgage, is quite convincing evidence of fraud. Undoubtedly, the fact that the deed does not truly state the exact transaction, and hence is well calculated to deceive creditors, is to be considered; but the deeds are frequently given as security only, and, when they are satisfactorily shown to have been given in good faith and without intent to defraud, we know of no ironclad rule which declares them void: Bump on Fraudulent Conveyances, 4th ed., sec. 55; Carey v. Dyer, 97 Wis. 554.

5. There are many claims of error in the admission of evidence; but as this action was tried by the court, and as [639] there was ample competent evidence to sustain the findings, it becomes unnecessary to consider these claims. It does not seem necessary to discuss other points made, as they relate to questions or inferences of fact, and we have discussed all the purely legal questions which are of any serious importance, involved upon the appeal.

By the Court. Judgment affirmed.

PARTNERSHIP—POWER OF PARTNER TO MAKE CHATTEL MORTGAGE.—One partner may secure a firm debt, in the ab-

sence of his copartner, and without his knowledge and consent, by executing a mortgage in the name of the firm upon its personal property: Hage v. Campbell, 78 Wis. 572; 23 Am. St. Rep. 422. The mortgage may cover the entire interest in the personal property of the partnership: Donald v. Hewitt, 33 Ala. 534; 73 Am. Dec. 431; and is not the less effective because unnecessarily made under seal: Tapley v. Butterfield, 1 Met. 515; 35 Am. Dec. 374.

MORTGAGES—VALIDITY—DESCRIPTION OF DEBT.—The omission of the sum, date, or the name of one of the signers of a note secured by a mortgage is not fatal if it can be identified: Boody v. Davis, 20 N. H. 140; 51 Am. Dec. 210. See Merrills v. Swift, 18 Conn. 257; 46 Am. Dec. 315; Utley v. Smith, 24 Conn. 290; 63 Am. Dec. 163. The indebtedness upon several promissory notes may be stated in a chattel mortgage as a gross sum of money, equal to the principal and interest of the notes, without mentioning the notes: Clark v. Hyman, 55 Iowa, 14; 39 Am. Rep. 160.

FRAUDULENT CONVEYANCES—DEED INTENDED AS MORTGAGE.—A deed, absolute on its face, but intended as a mere security for a debt, whether fraudulent and void as against the creditors of the grantor: Note to McFarlane v. Louden, ante, p. 885.

ROBERTSON *v.* PARKER.

[99 WISCONSIN, 652.]

JUDGE OF COURT OF LIMITED JURISDICTION, WHEN NOT LIABLE FOR ACTIONS BEYOND HIS AUTHORITY.—If a judge of a court of limited jurisdiction having authority as an examining magistrate, upon a complaint made to him to issue a warrant for the arrest of a person complained of, does issue such warrant, hears evidence against such person under the belief that he has the right to try him for the offense charged, and having heard such evidence, instead of committing him for trial, imposes sentence upon him directing his imprisonment, such judge is not liable, if he acted in good faith and merely erred in deciding that he had jurisdiction to pronounce the judgment.

JUDGE OF COURT OF LIMITED JURISDICTION, LIABILITY OF.—Where a judge of a court of limited or inferior jurisdiction secures jurisdiction of a person or cause, but in the progress of his investigation or proceeding decides that he has greater powers than he actually possessed, and therefore pronounces a judgment or sentence in excess of his powers and void, he is not personally answerable to a person subjected to imprisonment under such judgment or imprisonment.

JUDGE OF COURT OF LIMITED JURISDICTION, LIABILITY OF FOR WILLFUL ACTS BEYOND HIS AUTHORITY. If a judge of a court of limited or inferior jurisdiction sentences and commits a person willfully, corruptly, maliciously, and with full knowledge of his want of authority, he is liable to an action by the person so sentenced or imprisoned.

Action against the defendant as judge of the municipal court of Douglas county, a court of limited jurisdiction, for willfully, unlawfully, maliciously, and corruptly sentencing the plaintiff

to the workhouse while knowing he had no right or jurisdiction to do so. The defendant demurred to the complaint, and his demurrer having been overruled, he appealed from the order overruling it.

John A. Murphy, for the appellant.

George C. Cooper, for the respondent.

654 BARDEEN, J. It was conceded on the argument that the defendant, as judge of the municipal court of Douglas county, had no legal right to pronounce judgment against the plaintiff at the time and in the manner set forth in the complaint. Chapter 278 of the Laws of 1895 invests said judge with jurisdiction "to hear, try, and determine all criminal actions arising in said county, not punishable in state prison," and "to hold to bail all persons charged with other offenses 655 against the laws of the state of Wisconsin." The plaintiff was charged with abandoning his wife, and unreasonably refusing and neglecting to provide for her, contrary to section 4587c, of Sanborn and Berryman's Annotated Statutes. This section declares such an offense to be a misdemeanor, and, as a penalty, provides that such parent or husband, "on conviction thereof, shall be punished by imprisonment in the county jail, not less than fifteen days, ten days of which imprisonment, in the discretion of the court, the food may be bread and water only, or by imprisonment in the state prison not exceeding one year; except in counties having workhouses, commitment may be made to such workhouse in the discretion of the court." Section 4587d provides that "the several county and municipal courts of the state shall have concurrent jurisdiction with the circuit court of all offenses arising under this act, and every such county and municipal court shall be deemed open at all times to hear, try, and determine all cases arising under this act." Other sections provide that the judges of courts of record and court commissioners are authorized to issue process for the arrest and examination of offenders under the act, and that when a person was bound over for trial, the record of such examination should be forthwith transmitted to the county or municipal court of the proper county.

Under these provisions, there can be no doubt but that the defendant, as such municipal judge, had full authority to issue a warrant for the arrest of plaintiff upon the proper complaint being made, and to hold and conduct an examination. The

complaint is apparently drawn upon the assumption that he had such right, but the contention is, that he had no right to try the plaintiff for that offense. As examining magistrate, the defendant was acting directly within the lines of his authority. In that regard he had jurisdiction of the subject matter and of the person of the plaintiff, and his authority continued up to the time he assumed to pass sentence and to issue a commitment. At this point he is met with [656] the question of whether he had a right to pass judgment on the plaintiff. He finds that the act creating the offense provides that the several municipal courts of the state shall have concurrent jurisdiction with the circuit courts of all such offenses. He erroneously decides that the proceedings before him have been equivalent to a trial, and that he is invested with authority to exercise his discretion, and send the plaintiff to the workhouse of the county. He acts upon the assumption that the law giving the municipal courts of the state authority to try and determine such cases gave him such authority. In this he was in error. His power to act was limited to holding the accused to bail or committing him for trial. Up to the moment of pronouncing sentence, he had possessed ample power to do what he had done. In the decision of the question that he had jurisdiction to pronounce judgment, did the magistrate render himself liable in damages to the plaintiff? He did erroneously decide that he had power to try the plaintiff, but did such erroneous decision render him, as to all future acts, a trespasser? There are, we frankly admit, decisions holding squarely that it did, but they are based upon the proposition that the rights of the individual are paramount to all public interests involved, and that when such rights are unlawfully invaded his right of redress is absolute. This right, however, has been limited to cases where the offending officer is one possessing inferior or limited jurisdiction. Judges of courts of superior or general jurisdiction possess such immunity, even when it is alleged that they have acted willfully and corruptly. But, as to officers possessing limited jurisdiction, the lines are drawn tighter, and there are cases in the books holding them to the strictest accountability for their judicial acts. But in later years the doctrine has been somewhat relaxed.

It requires no argument to show that the doctrine of judicial immunity is absolutely essential to the very existence of the judicial office. A magistrate could not be respected [657] or independent if his motives for his official action, or his conclusions, could be put in question at the instance of every disappointed

suitor. In treating of this subject, the textbooks and decisions lay down the proposition that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must act within the bounds of his jurisdiction. As a general proposition of law, this statement must be accepted, but the embarrassment arises when it is attempted to be applied to cases in which the public officer is called upon to decide whether or not a particular case is within his jurisdiction, and he falls into error in arriving at that conclusion, and whether he can be held responsible if he acts in excess of his jurisdiction. Grove v. Van Duyn, 44 N. J. L. 654; 43 Am. Rep. 412, is a case in which these questions are discussed with great learning and ability. Beasley, C. J., thus announces the rule: "When the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable, in a suit, to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one. It protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically willful. Such protection is necessary to the independence and usefulness of the judicial officer, and such responsibiity is important to guard the citizen against official oppression."

There is a distinction running through many of the cases between a proceeding instituted and carried on by a magistrate, where the initial act failed to secure jurisdiction, or, having secured it, he had lost it by neglect of legal requirements, [658] and those where jurisdiction has been secured, and, during the progress of the investigation, the magistrate, in view of the situation, decides that he possesses greater power than he actually possesses. Brosde v. Sanderson, 86 Wis. 368, Frazier v. Turner, 76 Wis. 562, and Lueck v. Heisler, 87 Wis. 644, are cases upon which the magistrate's liability is established under the rule that void process or absolute loss of jurisdiction pendente lite renders him responsible to the injured party.

In discussing the question herein involved, we extract the following from Mr. Bishop's Noncontract Law, section 783: "Most of the cases exhibit an inclination to be specially se-

vere on justices of the peace and other inferior magistrates, compelling them, in distinction from the rule as to the superior judges, to respond in damages whenever their judicial act was without jurisdiction. But, in reason, if judges properly expected to be most learned can plead official exemption for their blundering in the law, a fortiori those from whom less is to be expected, and who receive less pay, should not be compelled to respond in damages for their mistakes honestly made after due carefulness." After stating that the better authorities appear greatly to limit the strict rule of liability, the learned author further says: "Plainly, in reason, if a judicial officer of whatever grade should take jurisdiction where he knew he had none, or without due care to ascertain the law, he should answer in damages to the party injured, and so, it is believed, are the authorities; and in legal reason, also, this should constitute the only exception to the general rule of exemption, as to which the grade of the judicial office should be deemed immaterial." We might cite many other protests and criticisms by courts and textwriters condemning the strictness and injustice of the rule. The current of modern legal thought is unquestionably in favor of the proposition cited: Thompson v. Jackson, 93 Iowa, 376.

659 In Austin v. Vrooman, 128 N. Y. 229, it was held that a justice of the peace was not personally liable for erroneously deciding that he had jurisdiction to try a defendant who had tendered bail and demanded a trial by jury, where the justice had jurisdiction of the offense and the defendant, except for such offer and demand, if the magistrate acted in good faith. In Bell v. McKinney, 63 Miss. 187, the defendant, mayor and ex officio justice of the peace, fined and committed plaintiff to jail for an offense committed outside of the corporate limits of the twn, over which he had no jurisdiction, except to bind the party over to wait the action of the grand jury. Held, that he was not liable if he acted in good faith. The test in these and many other cases that might be cited is whether the magistrate acted in good faith. It is true that there are cases where the question of good faith is no defense, if the magistrate exceeded his jurisdiction. Truesdale v. Combs, 33 Ohio St. 186, Patzack v. Von Gerichten, 10 Mo. App. 424, and Vanderpool v. State, 34 Ark. 174, are cases holding this rule to the limit of strictness. We are content, however, to join in the increasing procession of states that have adopted and are following the more humane and less stringent test of liability in cases of this kind. We have been led to prolong this discussion because of the very able

and earnest argument of counsel on both sides upon this question, and with the hope that it will aid in the future determination of this case.

Returning, now, to the complaint, we find it alleged, in substance, that the act of the defendant, in sentencing and committing the plaintiff, was willful, malicious, and corrupt, and performed when he well knew that he had no right or authority so to do. The motives and good faith of the defendant are directly challenged, and the demurrer admits the truth of these allegations. It being admitted that, under the law, the sentencing and commitment of [660] plaintiff were beyond the authority of defendant, and by the pleading that the act was willfully, maliciously, and corruptly done, and with full knowledge of his want of authority, we see no escape from the conclusion that the complaint states a cause of action.

By the Court. The order of the superior court of Douglas county is affirmed.

JUDGES—LIABILITY TO CIVIL ACTION.—A judge of a court of record is not liable in a civil action, even for corrupt misconduct in office: Cunningham v. Bucklin, 8 Cow. 178; 18 Am. Dec. 432, and note. It is also generally stated that a judicial officer cannot be called to account in a civil action for his determination of acts in his judicial capacity: Stewart v. Case, 53 Minn. 62; 39 Am. St. Rep. 575, and note. But judges of inferior courts are liable when acting beyond their jurisdiction: Borden v. State, 11 Ark. 519; 54 Am. Dec. 217. Although where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is judicial, and such officer is not liable in a suit to the person affected by his decision, whether such decisions be right or wrong: Extended note to McCall v. Cohen, 42 Am. Rep. 650. See extended note to Yates v. Lansing, 6 Am. Dec. 303.

CASES

IN THE

SUPREME COURT

OF

ARKANSAS.

PORCH *v.* ARKANSAS MILLING COMPANY.

[65 ARKANSAS, 40.]

EXEMPTIONS IN PARTNERSHIP PROPERTY.—A partner is not entitled to hold exempt from sale under an execution issued on a judgment against him for an individual debt, so much of his interests in the assets of the partnership as is equal in value to the exemptions from sale under process allowed him by law.

EXEMPTIONS IN PARTNERSHIP PROPERTY.—Partners are not, during the existence of the partnership, entitled to an individual exemption in the partnership property.

EXEMPTIONS—BURDEN OF PROOF to show that certain property is exempt from sale under execution is upon the claimant.

Claim of individual exemption in partnership property. The Arkansas Milling Company recovered judgment against Porch, procured the issuance of an execution thereon, and levied such execution upon the individual interest of Porch in the fixtures and furniture in a drugstore owned by Porch and one Crook as partners. Both notified the officer levying the execution that the property levied upon was partnership property, and that each of them was the owner of one-half thereof. The officer who levied the execution made return thereof stating the facts. Thereupon the Arkansas Milling Company filed its complaint in equity to subject Porch's interest in such partnership property to sale to satisfy its debt, and alleged that he owned no other property. Porch answered claiming his statutory exemption from execution in all the residue of the partnership property which was in excess of the partnership indebtedness, and which

he claimed would not exceed the statutory limit of value for exemptions. Plaintiff's demurrer to such answer was sustained, and it was given judgment against the defendant Porch for one hundred and thirteen dollars, with interest and costs. The trial court also ordered that the interest of Porch in such drugstore, constituting the partnership property, and which was valued far in excess of the amount of the partnership debts, be sold to satisfy such judgment. Porch appealed.

O. W. Watkins, for the appellant.

G. C. Christian, for the appellee.

[42] HUGHES, J. The precise question in this case has not been decided in this court.

Following the decided weight of authority, it is held in Richardson v. Adler, 46 Ark. 43, that "the members of an insolvent [43] firm are not entitled to the exemptions allowed by law, out of the partnership property, after it has been seized to satisfy the demands of the creditors of the firm." The court said: "The interest of each partner in the partnership assets is his portion of the residuum after all the liabilities of the firm are liquidated and discharged. Property belonging to the firm cannot be said to belong to either partner as his separate property. It is contingent and uncertain whether any of it will belong to him on the winding up of the business, and the settlement of his accounts with the firm. 'Joint property is deemed a trust fund, primarily to be applied to the discharge of partnership debts, against all persons not having a higher equity' ": Citing Pond v. Kimbal, 101 Mass. 105; Gaylord v. Imhoff, 26 Ohio St. 317; 20 Am. Rep. 762; Giovanni v. First Nat. Bank, 55 Ala. 305; 28 Am. Rep. 723; In re Handlin, 3 Dill. 290.

As affecting the question involved, the statute of Ohio exempting personal property is substantially like ours, which provides that: "The personal property of any resident of this state, who is married or the head of a family, in specific articles to be selected by such resident not exceeding in value the sum of five hundred dollars, in addition to his or her wearing apparel, and that of his or her family, shall be exempt from seizure on attachment, or sale on execution, or other process from any court, on debt by contract": Sandels and Hill's Digest, sec. 3716; Const., art. 9, secs. 1, 2.

In the case at bar the appellant filed no schedule claiming his exemption in specific articles.

In the opinion in Gaylord v. Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762, the Ohio supreme court said: "Looking alone to the language of the section above quoted, we find nothing to justify the inference that the legislature, in passing it, was intending to provide for other than individual debtors, and for the exemption of their individual property from sale on execution; and, when construed in connection with the law relating to partnerships, as it has always stood and still stands, we are convinced that it could not have been the intention of the lawmaker to bring partners or partnership property within the operation of the section in any respect. Dealing with the statutory right, and excluding equitable considerations, which have no place here, our convictions [44] are based upon the fact that the right of exemption, and the mode of exercising it prescribed by the statute, are wholly inapplicable to partnership property or the rights of the partners therein, and inconsistent with the rights of their creditors in relation thereto. The language of the section points unmistakably to property owned individually. The selection of the exempted property is to be made by the execution debtor, and the property selected is to be appraised and set off to the debtor. 'Partners are joint tenants in their stock in trade, ... and no partner has an exclusive right to the joint stock': 3 Kent's Commentaries, 37."

It will be seen by examination of this opinion of the Ohio court and the case of Richardson v. Adler, 46 Ark. 43, that Judge Smith, who delivered the opinion in the latter case, adopts and relies upon the reasoning and the principles laid down in the Ohio case. It seems to us that the reasoning in those cases applies to the case at bar with as much force as it does to those cases. We think the doctrine sound, and supported by the weight of authority.

In the case of McCoy v. Brennan, 61 Mich. 362, 1 Am. St. Rep. 589, it is held that partners can, during the existence of the partnership, claim an individual exemption in partnership property, when taken under legal process for partnership debts. The same is held in Chipman v. Kellogg, 60 Mich. 438. Some other states hold the same. The idea advanced to support, in part, these cases is that the exemption statutes should receive a liberal construction in harmony with their humane purpose. Such cases are Stewart v. Brown, 37 N. Y. 350; 93 Am. Dec. 578; Blanchard v. Paschal, 68 Ga. 32; 45 Am. Rep. 474; Servanti v. Lusk, 43 Cal. 238.

In opposition to the doctrine of these cases, the weight of authority sustains the rule that partners cannot, during the continuance of the partnership, claim an individual exemption in the partnership property: Giovanni v. First Nat. Bank, 55 Ala. 305; 28 Am. Rep. 723; Bonsall v. Comly, 44 Pa. St. 442; Guptil v. McFee, 9 Kan. 30; Baker v. Sheehan, 29 Minn. 235; Prosser v. Hartley, 35 Minn. 340; State v. Bowden, 18 Fla. 17; State v. Spencer, 64 Mo. 355; 27 Am. Rep. 244; Richardson v. Adler, 46 Ark. 43; Wise v. Frey, 7 Neb. 134; 29 Am. Rep. 380; Gaylord v. Imhott, 26 Ohio St. 317; 20 Am. Rep. 762; [45] White v. Heffner, 30 La. Ann. 1280; 31 Am. Rep. 238; In re Handlin, 3 Dillon, 290; Pond v. Kimball, 101 Mass. 105.

The rule is said to rest upon the principle, well recognized in the decisions, that the title and ownership of partnership property is in the partnership, and neither partner has any exclusive right to any part of it.

Our constitution and statute provide that the debtor shall be entitled to claim his exemption in specific articles, to be selected by him. As we have seen, this he cannot do while the partnership continues, as the property does not belong to him individually. When the debts of the partnership are paid, if any surplus of partnership property remains, he can claim his exemption in his part of this surplus.

Had he asked that the creditors be brought in, and the partnership debts be settled, and account be had between him and his copartner, and his interest in the surplus, after paying the debts of the partnership, ascertained, it is probable that the court should have done this.

The cases in our court to the effect that the debtor claiming exemption must claim specific articles are numerous. The burden to show that property, claimed as exempt, is exempt is upon the claimant. He must bring himself strictly within the statute.

The judgment is affirmed.

MR. JUSTICE BATTLE dissented and said, that "partner is entitled to hold exempt from sale, under an execution issued on a judgment against him for a debt owing by him individually, so much of his interest in the assets of the partnership as is equal in value to the exemptions from sale under process allowed him by law. A partner has no specific interest in any particular chattel or asset, or part of the property of the firm; his only interest is in a proper proportion of the surplus of the whole after payment of debts, including the amounts due the other partners": Richardson v. Adler, 46 Ark. 43, 48; Giovanni v. First Nat. Bank

of Montgomery, 55 Ala. 305, 310; 28 Am. Rep. 723; 1 Bates on Partnership, sec. 180; 1 Lindley on Partnership, 2d Am. ed. *339, *340; 1 Freeman on Executions, 2 ed. sec. 125, p. 298. "No private creditor of a partner can take by his execution anything more than that partner's share in whatever surplus remains after the partnership effects have paid the partnership debts: Gaylord v. Imhoff, 26 Ohio St. 317-324; 20 Am. Rep. 762; Harris v. Phillips, 49 Ark. 58, 59; 2 Freeman on Executions, 2d ed., sec. 254 a, p. 809. The debtor's right to claim his exemptions is coextensive with the creditor's right to seize and sell under his execution, except in cases specifically excepted from the operation of the law: Sannoner v. King, 49 Ark. 299-301;" 4 Am. St. Rep. 49. Mr. Justice Battle quoted from 1 Freeman on Execution, sec. 221, pages 670, 671, to show that the property of a cotenant may be exempt from execution, and continuing said: "Under the statute, the interest of the debtor partner cannot be sold until it is ascertained and fixed by equitable proceedings. In this proceeding his interest can be separated from the partnership assets, and it is the duty of the court to do so when the rights of any of the parties demand it; and especially is this the case when it becomes necessary to carry into effect the humane and remedial purposes of the law upon exemptions. Why should it not set apart to him his interest, so that he can select out of it the exemptions allowed him by law? The design of this law was to shield the poor, and not to strip them. Should the court refuse to protect the debtor partner when it is in its power to do so? He has a right to his exemptions. Having the right, he is entitled to the enforcement of it; and, being entitled to the enforcement of it, it is the duty of the court to grant him the relief. Grant him the relief—set apart to him his share in the assets of the partnership—and there is no obstacle in the way to his selecting his exemptions out of it; for he can do that at any time before the sale, upon giving the necessary notice. In a recent case, this court held that a judgment in favor of a plaintiff against a garnishee for the recovery of the amount owing by the latter to the defendant was no bar to the defendant selecting and holding the debt of the garnishee as his exemption; and that he could select and hold the money collected on the judgment against the garnishee, as his exemption, at any time before it is paid to the plaintiff, provided it does not exceed the amount allowed for that purpose: Blass v. Erber, 65 Ark. 112, post, p. 907. In other cases, this court has held that a judgment condemning property to be sold to pay a debt does not defeat the right of the defendant in the judgment to hold any part of it as his exemption, provided he selects it for that purpose before it is sold: Robinson v. Swearingen, 55 Ark. 55; Bunch v. Keith, 64 Ark. 654. This being the law, the debtor partner is certainly entitled to have so much of his interest, when separated from the assets of the firm, as will equal in value the exemptions allowed him by law, set apart to him, to hold free from sale to satisfy the execution levied on the same, when he demands it before the final decree in the equitable proceedings is rendered, as was done in this case."

EXECUTION—EXEMPTION IN PARTNERSHIP PROPERTY. Partners cannot, during the existence of the partnership, claim an individual exemption in partnership property taken under legal process for partnership debts: Aiken v. Steiner, 98 Ala. 355; 39 Am. St. Rep. 58. Where, however, the claim to exemption is not prejudicial to other members of the partnership, there seems to be no reasons for denying the exemption on the ground that the debtor owns a part instead of the whole of the property. As a general rule, a part interest is as much exempt from execution as though it were an interest in severalty; and this is true whether it be held in copartnership or cotenancy, and whether the execution be for the debt of one owner or for the debt of all owners: See monographic note to Russell v. Cole, 57 Am. St. Rep. 437. See McCoy v. Brennan, 61 Mich. 362; 1 Am. St. Rep. 589; Moyer v. Drummond, 32 S. C. 165; 17 Am. St. Rep. 850; extended note to State v. Spencer, 27 Am. Rep. 246.

PHOENIX INSURANCE COMPANY *v.* FLEMMING.

[65 ARKANSAS, 54.]

INSURANCE—CONSTRUCTION OF POLICY—WRITTEN AND PRINTED PARTS.—The written portion of a fire insurance policy insuring benzine as part of a stock of merchandise overrides the printed portion of the policy forbidding it to be kept.

INSURANCE CONSTRUCTION OF POLICY—WRITTEN AND PRINTED PARTS.—Benzine kept bottled in small quantities as part of a stock in trade is included in a fire insurance policy, containing a written description of the property insured as a stock of drugs and chemicals such as usually kept for sale in a drug-store, although the printed portion of the policy stipulates that it shall be void if benzine is kept without an agreement indorsed on the policy. The latter stipulation refers to keeping benzine in large quantities.

INSURANCE—FORFEITURE—WAIVER.—Forfeiture of a fire insurance policy is not waived by an examination of the books of account of the insured by the insurer after knowledge of the forfeiture, when the policy provides, that, in case of loss the insurer can examine such books without waiving any condition of the policy.

INSURANCE—FORFEITURE — WAIVER.—If an adjuster for a fire insurance company, after a loss, states to the assured that the policy is forfeited for a breach of its conditions, and replies, in response to a question, that the company will insist upon strict proof of the loss, he does not thereby waive any existing forfeiture.

INSURANCE—FORFEITURE—WAIVER.—The issuance of a policy of insurance with knowledge of facts which, by the terms of the policy, render it void, is a waiver of such ground of forfeiture, although the policy provides that its conditions shall not be waived by any officer or agent of the company unless such waiver is indorsed upon the policy.

INSURANCE—FORFEITURE — WAIVER — BURDEN OF PROOF.—When forfeiture of a fire insurance policy is claimed for breach of conditions concerning the keeping of fireworks, the fact that fireworks were on exhibition, or that one of the insurance agents, after the policy was issued, purchased fireworks in his in-

dividual capacity at the insured store, does not necessarily show that another agent issuing the policy knew of the presence of such fireworks, so as to constitute a waiver by him of such forfeiture. The burden of proof is on the insured to show that the agent issuing the policy knew at the time of the keeping of such fireworks, or that the other agent, with knowledge, did some act in the course of his duties as such, recognizing the continuing validity of the policy.

J. J. and E. C. Hornor, for the appellant.

Stephenson & Trieber and Quarles & Moore, for the appellees.

[57] RIDDICK, J. This is an action upon a fire insurance policy to recover the value of property insured which had been destroyed by fire. The property is described in the written portion of the policy as a "stock of merchandise, consisting of drugs, stationery, liquors, tobacco, toys, and fancy articles, paints, oils, chemicals, and such other goods, not more hazardous, such as is usually kept for sale in a drugstore." The printed portion of the policy stipulated that the policy should be void if benzine or fireworks were kept, unless by agreement indorsed on the policy. No such agreement was indorsed upon the policy, and the evidence showed that both benzine and fireworks were kept in the store of plaintiffs. The insurance company contends that this avoided the policy.

As to the benzine, only a small quantity was kept in the [58] store. This was put up in bottles containing from two to six ounces each, to be sold to ladies for the purpose of cleansing gloves. It amounted to about a gallon in all. The testimony showed that it was customary for druggists to keep benzine bottled in small quantities to be sold for such purposes, and that, as one witness stated, "a drugstore without it would be incomplete." The question arises whether this benzine was not included in the written description of the property insured, for if it was a part of the property insured, it follows as a matter of course that its presence in the store did not avoid the policy. The written portion of the policy insuring the benzine as a part of the stock of merchandise would override the printed portion forbidding it to be kept. To hold otherwise would make the contract mean in effect that the company contracted to take pay and insure the owner of this benzine against its destruction by fire, but only on condition that no benzine was kept. The courts will not presume that the parties intended to make such an absurd agreement, but in such a case will presume that the intention was that the printed portions of the policy forbidding the keeping of benzine should not apply to the keeping of it bottled

in small quantities as customary with druggists, but only to storing or keeping it in large quantities: Faust v. American Ins. Co., 91 Wis. 158; 51 Am. St. Rep. 876; Mears v. Humboldt Ins. Co., 92 Pa. St. 15; 37 Am. Rep. 647; Hall v. Insurance Co. of N. A., 58 N. Y. 292; 17 Am. Rep. 255; Pindar v. Kings Co. etc. Ins. Co., 36 N. Y. 648; 93 Am. Dec. 544; Harper v. Albany etc. Ins. Co., 17 N. Y. 197; Archer v. Merchants' etc. Ins. Co., 43 Mo. 434; Cushman v. Northwestern Ins. Co., 34 Me. 487.

Now, the property insured is described as a stock of merchandise consisting, among other things, of "drugs" and "chemicals." The word "drug" is defined as any animal or mineral substance used in the composition of medicines; any stuff used in dyeing or in chemical operations; any ingredient used in chemical preparations employed in the arts: Webster's Dictionary; Century Dictionary. The term "chemical" is defined as a substance used for producing a chemical effect, or one produced by a chemical process; a chemical agent prepared for scientific or economic use: Webster's Dictionary; Century Dictionary. The definition of benzine given in Webster's International Dictionary is "a liquid consisting mainly of the lighter and more volatile [59] hydro-carbons of petroleum or kerosene oil, used as a solvent and for cleansing soiled fabrics." It is used in the arts as a solvent for fats, resins, and certain alkaloids: Century Dictionary.

Without going into a discussion of the scientific or exact meaning of these terms, we will say that, in our opinion, the evidence shows that benzine kept in the quantities and for the purposes that the proof shows that it was kept by plaintiffs was included in the terms "drugs" and "chemicals," used in describing the property insured, and that the company intended to insure such benzine.

As the company writes the policy, the rule is to resolve doubts arising as to its meaning in favor of the assured: Jones v. Southern Ins. Co., 38 Fed. Rep. 19. Benzine put up in small quantities was a part of the stock asked to be insured. Bottled and corked in such quantities, it was probably not more dangerous than other chemicals. It was not necessary to give the particular name of each drug or chemical, or other article that went to make up the entire stock, and the company, in describing the property insured, has chosen to use general terms, which we think fairly include the benzine in the stock. For these reasons we are of the opinion that the policy was not avoided by the fact that benzine was kept bottled in small quantities as a part

of the stock of drugs and chemicals. The agents of the appellant company seem to have been of this opinion also, for, after the fire, when they had examined the books, and knew the facts, they stated to plaintiffs that their policy was void because they kept fireworks, but said nothing of the benzine.

Was the policy avoided by the fact that fireworks were kept in plaintiff's store? We will first notice the contention made by plaintiffs that the forfeiture, if any existed, was waived by a demand, made on the part of the company after knowledge that fireworks were kept in the store, that plaintiffs should exhibit their books, and make out proof of loss. The policy provided that, in case of loss, the company should have the right to make an examination of the books of account kept by the assured, and that such examination should not be treated or considered as a waiver of any condition of the policy, or of any forfeiture thereof. For this reason the demand for the [GO] books and the examination thereof cannot, we think, be treated as a waiver of the conditions of the policy.

After finding from an examination of the books that fireworks had been kept, the adjuster of the company stated to plaintiffs that their policy was void because fireworks were kept; but he offered to settle by compromise, and they made an agreement to appraise the goods, it being stipulated therein that such agreement and appraisement should not waive any of the conditions of the policy. After the appraisement, the adjuster again told the plaintiffs that their policy was void, and that the company would resist any effort to collect it by action at law, but offered to pay another sum in compromise. This offer being refused, the adjuster said that he would leave on the first boat for Memphis. He was thereupon interrogated by one of the counsel for plaintiffs as follows: "Mr. Boyd, in behalf of these companies you represent, you have had the books, and have gone through them. Do you require any further proofs of loss, or are you satisfied with everything?" To which Boyd replied: "We shall insist upon strict proof of loss, under the terms of the policy." Plaintiffs assert that this answer of Boyd waived all forfeitures.

Now, the positive denial of liability and assertion of the agent that the policy was void because fireworks were kept may have been a waiver of proof of loss, but we do not think that the forfeiture, if any had occurred, was waived by the reply of the agent quoted above. By the terms of the policy, the assured agreed to furnish proof of loss, and agreed that the loss should not be

payable until such proof was furnished. Unless proof of loss was waived, the assured had no right of action against the company until the same was furnished, and, in order to determine whether the company would waive such proof, or for some other reason, the attorney for appellee propounded the above question. What the agent said was in reply to this question, and, when taken in connection with his previous assertion that the policy was void, and that the company would resist its enforcement, meant, in our opinion, nothing more than that the company did not intend to waive proof of loss.

In a recent case decided by the court of appeals of New [61] York it was said that "the rule is now established that if, in any negotiations or transactions with the assured after knowledge of the forfeiture, the company recognized the continued validity of the policy, or does acts based thereon, or requires the insured to do some act or incur some trouble or expense, the forfeiture is waived." The court further said that "while the later decisions all hold that such waiver need not be based upon a technical estoppel, in all cases where this question is presented, when there has been no express waiver, the fact is recognized that there exists the elements of an estoppel": Armstrong v. Insurance Co., 130 N. Y. 560.

This seems to be a correct statement of the law upon this question: German Ins. Co. v. Gibson, 53 Ark. 494. Now, it will be noticed that the agent here made no demand or request that the assured should furnish proof of loss. He said nothing from which the assured could infer that if such proof was furnished the loss would be paid. It cannot be legitimately inferred from his reply, above quoted, that he intended to recognize the validity of the policy, for he had previously stated that the policy was void; nor was such reply calculated to mislead the assured in any way, and it cannot be taken as a waiver of the forfeiture, if any existed. We are therefore of the opinion that it was improper for the presiding judge to submit the question arising on this point to the jury, as he did in the third instruction given on the trial. While such an instruction might be properly given under a different state of facts, yet in this case there was no evidence upon which to base such an instruction, and it was calculated to mislead and was prejudicial to appellants.

But it is further contended by plaintiffs that there could have been no forfeiture of the policy on the ground that fireworks were kept, for the reason, as they contend, that the agent of the company who issued the policy knew at the time it was issued

that fireworks were kept in stock by plaintiffs, and that the issuance of the policy under such circumstances was a waiver of the condition forbidding fireworks to be kept. We will proceed to consider the evidence bearing on that point, for if the proof was conclusive that the agent of appellant knew at the time he issued the policy that fireworks were kept in the [62] store of assured, it would be presumed that the condition forbidding the keeping of such fireworks was waived, and the error above noticed would be harmless. It is now too well settled to require discussion that the issuance of a policy of insurance with knowledge of facts which by the terms of the policy render it void will be treated as a waiver of such ground of forfeiture: Insurance Co. v. Brodie, 52 Ark. 11.

And this is true, even though the policy contains a stipulation that the conditions of the policy shall not be waived by any officer or agent of the company unless such waiver be indorsed upon the policy. It is a general rule of law that the parties to a written contract may afterward change or alter such contract by a parol agreement to that effect, and contracts with insurance companies furnish no exception to this rule: Phoenix Ins. Co. v. Public Parks Am. Co., 63 Ark. 187; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; 2 Beach on Insurance, sec. 787.

The facts bearing on this point are as follows: The policy in question was issued by R. H. Crutcher & Co., a firm composed of R. H. Crutcher and one Friborg. This firm was the agent of the defendant company, and, in order to show that these agents knew at the time the policy was issued that fireworks were kept in the store, J. H. Flemming, one of the plaintiffs, was sworn as a witness. After stating that the policy was issued by Crutcher & Co., he was asked the following question: "Please state whether, at the time they issued this policy of insurance, they had notice and knew the fact that you kept fireworks for sale and on hand in that store?" To which he replied: "This policy was issued on the twenty-fourth day of December, I believe, at a time when our stock of fireworks was very large, and on exhibition, and Mr. Friborg bought fireworks from me during that Christmas, and knew we had them for sale."

Now, no express waiver of the condition forbidding the keeping of fireworks is claimed, and, in order that a waiver of such condition may be implied from the issuance of the policy, it must be shown that it was issued with knowledge on the part of the agent that fireworks were kept, and the burden of proof to show this is on the plaintiff. But the witness in the [63] answer above

quoted, which was all the testimony on this point, does not show that the agent had such knowledge at the time the policy was issued. It does not necessarily follow from the fact that fireworks were on exhibition, or that one of the agents, after the policy was issued, purchased fireworks at the store, that the agent issuing the policy knew of the presence of such fireworks. The fact that one of the agents went to the store shortly after the policy was issued to purchase fireworks is a circumstance tending to show that he knew that fireworks were kept there, but the witness does not say that this member of the firm issued the policy. The agent of the insurance company was a partnership, and each member of the firm could act for the firm, and issue the policy. If, in the course of the negotiations for this policy, and before it was issued, plaintiffs had notified either member of the firm that they kept fireworks in their store, this would have been notice to the company, and it would have been bound; but no such notice was given. The knowledge of the fireworks shown here was acquired by the agent, not while acting for the company or his firm, but casually while attending to his own affairs. To make this knowledge affect the company, it must be shown that the agent afterward, with this information present in his mind, issued the policy, or consented to its issuance, or did some act in the course of his duties as agent recognizing the continuing validity of the policy: Distilled Spirits case, 11 Wall. 356. But this was not shown, or at least it was not so conclusively shown as to justify us in saying as a matter of law that the knowledge of the agent was established. We cannot, therefore, say that the error heretofore noticed was harmless, for the jury may not have found that the agent issuing the policy had notice of the fireworks, and may have based their verdict upon a belief that the forfeiture was waived by the statement of the adjuster that the company would insist upon strict proof of loss under the terms of the policy.

Several other rulings of the court have been called to our attention and considered, but, except as above stated, we do not discover that the court committed any material error.

We agree with counsel for appellant that instruction No. 2 [64] given by the presiding judge is slightly defective in form, and it is possible that it might be misunderstood. We feel sure that if the attention of the judge had been called to the defect, it would have been corrected. It does not appear that his attention was called to it, or that appellant, during the trial in the circuit court, objected to the instruction on that ground, and a

general objection is not sufficient to raise such a question in this court.

For the error indicated, the judgment is reversed, and a new trial ordered.

INSURANCE — WRITTEN PARTS CONTROL PRINTED PARTS OF POLICY.—If a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business does not avoid the policy, although it is expressly prohibited in the printed portions of the policy: Faust v. American Fire Ins. Co., 91 Wis. 158; 51 Am. St. Rep. 876, and note; Maril v. Connecticut Fire Ins. Co., 95 Ga. 604; 51 Am. St. Rep. 102.

INSURANCE—WAIVER OF FORFEITURE — BURDEN OF PROOF.—If an insurer, knowing the facts, does that which is inconsistent with an intention to insist upon a strict compliance with the conditions precedent of a contract of insurance, he must be treated as having waived their performance, and the insured may recover without proving performance, even though the policy provides that none of its conditions shall be waived except by written agreement: Horton v. Home Ins. Co., 122 N. C. 498; 65 Am. St. Rep. 717, and note. But a waiver never occurs unless intended, or where the act relied on ought, in equity, to estop the party from denying it: Diehl v. Adams Co. Mut. Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302; though slight evidence will raise a waiver against an insurance company when the equities are in favor of the assured: Note to Farnum v. Phoenix Ins. Co., 17 Am. St. Rep. 247. In an action upon a fire insurance policy, proof on the part of the insurer of the existence of a condition of things imposing a certain duty on the insured casts upon the latter the burden of proving compliance with such duty: Note to Taylor v. State Ins. Co., 60 Am. St. Rep. 216.

BLASS *v.* ERBER.

[65 ARKANSAS, 112.]

EXEMPTIONS—GARNISHMENT.—Funds in the hands of a garnishee after judgment against him may be claimed as exempt by the debtor. The funds, if paid by the garnishee in satisfaction of the judgment, cannot be recalled by the debtor under his claim of exemption.

W. T. Tucker, for the appellants.

Fulk & Fulk, for the appellee.

113 BUNN, C. J. This is a controversy over a claim of exemption of a debt involved in a garnishment proceeding, begun in one of the justice of the peace courts of Pulaski county, where the claim of exemption was disallowed in part, and, on appeal to the second division of the circuit court, was there allowed, from which judgment of allowance the plaintiff in garnishment

took the appeal to this court. Gus Blass & Co. in said justice's court recovered judgment against Mrs. Sarah Erber. Afterward the plaintiffs filed their complaint, and thereon their allegations and interrogatories against one A. Lofton, as garnishee, alleging that he was owing or had money in his hands belonging to Sarah Erber, amounting to the sum of one hundred dollars, and interrogatories accordingly were propounded. The writ of garnishment was issued and served, and made returnable on the 20th of April, 1896. On the 15th of April, 1896, Lofton, by his attorney, answered that he had funds in his hands belonging to Sarah Erber, amounting to the sum of one hundred dollars. Sarah Erber gave notice that she would file her schedule and claim of exemptions against this debt on April 20th, the return day of the garnishment, and on that day accordingly filed her schedule, claiming the one hundred dollars as exempt, and thereupon supersedeas was issued on that day. The notice bears no date, as we can see from the record, but presumably it was within proper time. On the same day, April 20th, Mrs. A. Lofton, answering for A. Lofton, the garnishee, stated that he was [114] indebted to the defendant, Sarah Erber, in the sum of two hundred and thirty-nine dollars, and thereupon the court rendered judgment against the garnishee for the sum of eighty-five dollars and eighty cents in favor of the plaintiffs, Gus Blass & Co., which was less than the balance of the two hundred and thirty-nine dollars, after deducting the one hundred dollars exemption theretofore allowed the defendant, and a supersedeas was granted for one hundred and forty-eight dollars in favor of defendant. On the sixth day of May, 1896, the defendant filed a second schedule, in which she stated and claimed the two hundred and thirty-nine dollars admitted to be owing her by the garnishee, but the court refused to issue supersedeas on this schedule and claim, and defendant appealed to the circuit court, where her claim was allowed, and plaintiff appealed to this court, as stated.

All questions of notice of filing schedule and claim of exemption were waived by plaintiff's appearance and contesting same: Brown v. Doneghey, 46 Ark. 497; Garrett v. Wade, 46 Ark. 493. The same may be said of the affidavit for appeal: Elder v. Crabtree, 59 Ark. 177.

The schedule and claim of exemption are in due form, the record showing the judgment was for a debt on contract, and the only question, therefore, left for our consideration is: Was the claim of exemption available, being filed after the rendition of

the judgment against the garnishee, and thus fixing the funds of defendant in his hands? This is a mooted question, being determined in some jurisdictions apparently as against the validity of the claim, but in others in favor of it. The latter is the doctrine of the textbooks, and doubtless is supported by the weight of authority. At all events, it is the doctrine of this court, as announced in Robinson v. Swearingen, 55 Ark. 55, where the court used the following language on the subject: "As to executions, it is established that the claim [of exemption] may be asserted at any time before sale; and we think it apparent that no distinction was intended or made, either in the constitution or statute, between ordinary executions, 'other process,' and attachments not specific, as to the right of the claimant to assert his claim. A judgment sustaining an attachment, and ordering the attached property sold, follows an inquiry quite apart from the defendant's claim of exemption, and is conclusive only as to matters involved in the inquiry. We do not mean that the claim of exemptions may not be set up and determined prior to or along [115] with the issue upon the attachment, but simply that an ordinary determination of the latter does not include the former. There is nothing in the record by which it appears that the court inquired into or adjudged the defendant's claim of homestead in the order of sale, and we can indulge no presumptions to that effect. There being no adjudication of this right, the defendant was at liberty to assert it in a manner provided by statute at any time before sale, whereupon it becomes the duty of the clerk to issue supersedeas." That was a case of property taken under an order of attachment, and on final hearing ordered sold to pay the debt adjudged against the defendant; but, by strict analogy, the rule in case of property seized under the garnishment proceedings is necessarily the same, as to the time within which the exemption claim may be asserted; the equity of the rule being even stronger in the case of garnishment, where the defendant is not made a party, than in an attachment where he is a necessary party, and is always made such.

Our attention has been called to the decision in the case of Randolph v. Little, 62 Ala. 396, in support of the opposite doctrine; but, on careful inspection, it will appear that the dissenting opinion in Webb v. Edwards, 46 Ala. 17, upon which Randolph v. Little, 62 Ala. 396, is expressly based, was to the effect that evidences of indebtedness owing by a garnishee to the defendant in judgment, and other choses in action, were not the subject of exemption under the peculiar statutes of Alabama.

The question of time when the claim should be filed was not discussed, and does not appear to have been relied on.

However that may be, the rule we have adopted, and the true rule, is that until the money or the proceeds of the property has been paid actually to the plaintiff, and thus appropriated toward the satisfaction of the judgment, the defendant has a right to assert his claim of exemption; but the money adjudged to be in the hands of or owing by the garnishee, or the proceeds of the property in his hands, when once paid toward the satisfaction of his judgment, cannot be recalled at the instance of the defendant.

Affirmed.

EXECUTION—EXEMPTION—WHEN MAY BE CLAIMED.—To claim property as exempt is a personal privilege of the debtor: Wyman v. Gay, 90 Me. 136; 60 Am. St. Rep. 238. The debtor cannot stand by, see, and know that the levy is about to be made, and afterward claim the exemption. He must, at the time, in some manner, indicate to the officer his purpose to claim the property as exempt: Extended note to Brown v. Leitch, 31 Am. Rep. 44. Under a statute providing that a claim of exemption must be filed after levy of process upon the property claimed as exempt from sale, such claim may be filed at any time before the sale under the levy: **Boylston v. Rankin, 114 Ala. 408; 62 Am. St. Rep. 111, and note.**

COLONIAL AND UNITED STATES MORTGAGE COMPANY *v.* SWEET.

[65 ARKANSAS, 152.]

JUDICIAL SALES—SETTING ASIDE FOR ADVANCED BID.—A mortgagee or other interested party is not entitled to have a mortgage foreclosure sale of land set aside before confirmation for the purpose of allowing him to advance the bid of the purchaser, when the sale is in accordance with the decree directing it, and the property sold has brought its market value, and the purchaser and those conducting or controlling the sale have committed no fraud, unfairness, or other wrongful act.

W. G. Weatherford and Norton & Prewitt, for the appellant.

J. P. Clarke, for the appellee.

[152] BATTLE, J. The Colonial & United States Mortgage Company instituted an action against S. E. Sweet, in the St. Francis circuit court, to recover a sum of money due it on certain [153] promissory notes, and to foreclose a mortgage executed to secure the payment of the same. It recovered a judg-

ment against Sweet on the notes for three thousand nine hundred and eighty-one dollars and sixty-seven cents, and a decree appointing a commissioner and ordering him to sell the lands described in the mortgage and thereby conveyed as a security, and that the sale be made for the purpose of paying the judgment. The commissioner, in pursuance of the terms of the decree advertised the lands to be sold, and notified the attorney of plaintiff of the day of sale. At the request of plaintiff's attorney, N. F. Lemaster agreed to attend the sale, and bid the amount of the decree for the lands in the name of and for plaintiff. The commissioner attended at the time and place appointed, and sold the lands to Walter Sweet at one minute before 3 o'clock in the afternoon, for the aggregate sum of two thousand five hundred dollars, he being the highest and the best bidder. Before he commenced the sale, the commissioner again notified the attorney of plaintiff by telegram of the fact that the land would be sold according to the notice. Lemaster had entirely forgotten the sale until he was shown the telegram, when he immediately, at ten minutes past 12 o'clock on the day of sale, delivered a dispatch to the telegraph operator at Memphis, Tennessee, to be sent by telegraph to Forrest City, Arkansas, distant from Memphis about forty or forty-five miles. It was addressed to the commissioner, and requested him to bid the full amount of the decree for the lands, and that he make the bid for plaintiff's attorney. No reply to his telegram was received by the commissioner until six minutes after 3 o'clock in the afternoon of the day of sale.

At the term of the court following the sale the commissioner made a report of his proceedings; and thereafter the purchaser asked the court to confirm the sale, and order the commissioner to convey the lands to him, and the plaintiff moved the court to allow him to advance the bid of the purchaser to the full amount of the decree. Evidence showing the facts was submitted by both parties. The clear preponderance of it showed that the lands were sold at their market value. The fairness and regularity of the sale was unimpeached by evidence. The court found that the sale was fair and regular, and made in conformity to the terms of the decree; "that no [154] unfair or improper conduct is imputable to the purchaser or commissioner"; that the lands were sold for their market value; and confirmed the sale, and ordered the commissioner to convey the lands to the purchaser. Plaintiff appealed.

Did the court err in refusing to allow appellant to advance

the bid of the purchaser? In Graffam v. Burgess, 117 U. S. 180, 191, Mr. Justice Bradley, speaking for the court, said: "It was formerly the rule in England, in chancery sales, that, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price ten per centum. But Lord Eldon expressed much dissatisfaction with this practice of opening biddings upon the mere offer of an advanced price, as tending to diminish confidence in such sales, to keep bidders from attending, and to diminish the amount realized. Lord Eldon's views were finally adopted in England in The Sale of Land by Auction Act, 1867, 30 & 31 Victoria, chapter 48, section 7. In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for indequacy of price, or unless the inadequacy be so great as to shock the conscience, unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed."

It is well settled by the weight of authority that there is no duty resting upon a court to set aside a sale of land for the purpose of allowing an interested party to advance the bid of the purchaser, where the sale is in accordance with the decree directing it, and the property sold has brought its market value, and the purchaser and those conducting or controlling it have committed no fraud, unfairness, or other wrongful act injurious to the sale, and there is no occurrence, or "special circumstance, affording, as in other cases, a proper ground for equitable relief"; and that appellate courts should not interfere with or set aside orders of the court confirming it: 4 Kent's Commentaries, 13th ed., marg. p. 192; 2 Jones on Mortgages, 5th ed., secs. 1640, 1670, 1676, and cases cited; 1 Sugden on Vendors, 7th ed., Perkins' notes, 93; Babcock v. Canfield, 36 Kan. 437; [155] Adams v. Haskell, 10 Wis. 123; Duncan v. Dodd, 2 Paige, 99; American Ins. Co. v. Oakley, 9 Paige, 259.

Appellant cites Tennessee cases to show that the sale in question should be set aside for the purpose of allowing it to advance the bid of the purchaser. But "in Tennessee, before confirmation, the rule is now settled that a simple advance of ten per centum, without any circumstance whatever of fraud, accident, or mistake, shall be sufficient to open the biddings, and that the practice must be liberally applied to effectuate the purpose of procuring the largest possible price": Click v. Burris,

6 Heisk. 539; Glenn v. Glenn, 7 Heisk. 367; Lucas v. Moore, 2 Lea, 1; Atkison v. Murfree, 1 Tenn. Ch. 51; Vaughn v. Smith, 3 Tenn. Ch. 368; Atchison v. Murfree, 3 Tenn. Ch. 728. This doctrine is contrary to the rule almost universally adopted in this country.

The sale in question was made in accordance with the decree authorizing it; the property sold brought its market value; the conduct of the commissioner in respect to it is beyond censure; the action of the purchaser is unimpeached by evidence; the sale is untarnished by an irregularity or unfairness; the mortgagor does not complain; the mortgagee (the appellant) failed to attend the sale through his own negligence, and failed to acquire the lands, but is entitled to receive under the sale their equivalent in value, and is thereby fully indemnified for his failure to attend. We think the order of the court confirming it should be affirmed, and it is so ordered.

JUDICIAL SALES — VACATION OF — ADVANCED BID.—The obvious policy of the law is to protect judicial sales in the absence of fraud: Coriell v. Ham, 4 G. Greene, 455; 61 Am. Dec. 134. A resale of property will not be ordered upon an offer of increase of price alone when the property has not been sold at a sacrifice. Special circumstances, appealing to equitable considerations, must always exist, where the sale is not void, to justify an order for resale: Page v. Kress, 80 Mich. 85; 20 Am. St. Rep. 504, and note. The English rule to open a sale whenever an advance of ten per cent on the former sale is offered is not adopted in Alabama: Littell v. Zuntz, 2 Ala. 256; 36 Am. Dec. 415.

HOT SPRINGS RAILROAD COMPANY *v.* DELONEY.

[65 ARKANSAS, 177.]

RAILROADS—EXPULSION OF PASSENGER—DAMAGES. If a passenger is unlawfully expelled from a railway train by the conductor thereon for refusal to pay fare, and such expulsion is entirely due to the fault and negligence of the ticket agent of the railway company in improperly making out his ticket, the company is liable to him for compensatory damages, such as for the humiliation suffered, and for the delay in completing the journey.

RAILROADS—EXPULSION OF PASSENGER.—If a railway conductor informs a passenger that he must pay fare or get off the train, and stops it for that purpose, on his refusal to pay, such conduct on the part of the conductor is equivalent to an expulsion of the passenger from the train.

RAILROADS — EXPULSION OF PASSENGER—MENTAL ANGUISH AS ELEMENT OF DAMAGE.—Although a passenger is wrongfully expelled from a railway train after explaining the situation to the conductor, he cannot recover for mental anguish caused by the resulting delay in reaching a sick relative. In such case, the mental anguish is too remote to enter as an element of damages.

J. M. Moore and W. B. Smith, for the appellant.

Wood & Henderson, for the appellee.

178 BUNN, C. J. This is a suit for damages for being expelled from defendant's passenger coach. Damages laid at two thousand five hundred dollars. Judgment for four hundred dollars, and defendant appealed, because of errors in giving and refusing instructions, and in the admission of improper testimony, and because the verdict is contrary to law and testimony, and is excessive.

The complaint, in substance, states that the plaintiff purchased two passenger tickets for passage of himself and brother from Hot Springs to Atkins, in this state, paying the full and regular price therefor, from the defendant's ticket agent at Hot Springs, who had authority to sell tickets over defendant's line to Malvern and the connecting line extending thence to Atkins; 179 that in a short time he boarded defendant's regular passenger train, intending to make his journey aforesaid, but that, having gone about one mile, the conductor of the train, to whom he had presented the tickets aforesaid, refused to accept them in payment of their fares to Malvern, and demanded that they pay their fares to said point, accompanying the demand with the threat or announcement that, unless plaintiff did so, he would put them off the train. After some parleying between them, the conductor stopped the train, and the plaintiff and his brother got off, and walked back to the Hot Springs depot, and then had the tickets corrected by the ticket agent; that they were thus delayed in their journey until the next train went out, which occurred eight or ten hours later; that the occasion of their journey was a receipt of a telegram just before the purchase of the tickets, informing them of the dangerous illness of another brother, residing at Atkins, and that, when they did reach him, he was in an unconscious state, and died sometime afterward, having never revived so as to recognize them. Plaintiff claimed damages because, by reason of the negligence of the ticket agent in not delivering him his ticket to Malvern, he was put off the car by the conductor, and at a different place than a regular stopping place or station; because he was thereby made the butt of laughter and ridicule by his fellow-passengers, and thereby suffered great indignities and mortification; because he was put to the trouble of walking back to Hot Springs depot; because of the delay; and because during the

delay he suffered mental anguish over the condition of his brother.

The answer of the defendant denied all negligence and improper conduct on the part of the conductor; denied that plaintiff was expelled from the cars, but, on the contrary, alleged that he got off voluntarily; and denied that plaintiff was injured in any manner.

The evidence sustains the allegations in the complaint, except as to what occurred between plaintiff and the conductor, and in that it is conflicting; and it also shows that the deceased brother at Atkins had been unconscious a day or two before his brothers arrived.

The suit is treated by the parties as one for tort, and not [180] for a breach of contract, and we will so treat it also. The contention of appellees is, that having purchased and paid for the tickets over appellant's and the connecting roads, and having boarded the train relying upon his ticket to insure him passage to Malvern as well as from thence to Atkins, he had the right to stand upon the contract thus made between appellant and himself, and to remain and be transported on said train, notwithstanding the mistake of the ticket agent of appellant in failing to deliver to him the coupon or portion of the ticket calling for passage from Hot Springs to Malvern, and that his expulsion by the conductor was therefore unlawful. On the other hand, the appellant contends that the conductor could only rely upon the face of the ticket to determine his duty in the premises, and that the representation of the passenger to the effect that he had in fact paid his fare, and that the ticket agent had made a mistake in not delivering him a proper ticket, was no evidence upon which he could lawfully act in his efforts to enforce the reasonable rules of the appellant company. The court below adopted the view of the appellee, and instructed the jury accordingly.

Whether, under such circumstances as are detailed in the testimony of this case, a conductor, collecting tickets and fares, is justified in relying solely upon the fact and appearance of the ticket to determine his duty as to the acceptance of the same, and as to his expulsion of a passenger for refusing to pay fare, in case of his rejection of the same, has given rise to one of the most protracted discussions in all the domain of the law pertaining to the relative duties of carriers and passengers; each side to the controversy naturally contending for a more or less rigid application of the peculiar rule contended for

by them. It may be of interest to present here at least a partial list of cases relied upon by both parties to the controversy, for the purpose of giving a better insight into the real nature of the controversy. In support of appellee's view, the following citations are made: St. Louis etc. Ry. Co. v. Mackie, 71 Tex. 491; 10 Am. St. Rep. 766; Missouri Pac. R. Co. v. Martino (Tex. Feb. 23, 1892,)18 S. W. Rep. 1069; Gulf etc. R. Co. v. Rather, 3 Tex. Civ. App. 72; Kansas City etc. Ry. Co. v. Riley, 68 Miss. 765; 24 Am. St. Rep. 309; Georgia etc. Co. v. Dougherty, 86 Ga. 744; 22 Am. St. Rep. 499; Head v. Georgia Pac. R. Co., 79 Ga. 358; 11 Am. St. [181] Rep. 438; Baltimore etc. Ry. Co. v. Bambrey (Pa., Nov. 5, 1888), 16 Atl. Rep. 67; Hufford v. Grand Rapids etc. Ry. Co., 64 Mich. 631; 8 Am. St. Rep. 859; Northern Pac. Ry. Co. v. Pauson, 70 Fed. Rep. 585; New York etc. Ry. Co. v. Winter, 143 U. S. 60; Sloane v. Southern California Ry. Co., 111 Cal. 668; Louisville etc. R. Co. v. Gaines, 99 Ky. 411, 59 Am. St. Rep. 465; Philadelphia etc. Ry. Co. v. Rice, 64 Md. 63; Muckle v. Rochester Ry. Co., 79 Hun, 33; Trice v. Chesapeake etc. Ry. Co., 40 W. Va. 271; Gulf City etc. Ry. Co. v. Halbrook, 12 Tex. Civ. App. 475; Little Rock etc. Ry. Co. v. Dean, 43 Ark. 529; 51 Am. Rep. 584, and others cited by appellees' counsel. In support of appellant's contention, its counsel cite McKay v. Ohio River R. R. Co., 34 W. Va. 65; 26 Am. St. Rep. 913; Louisville etc. R. Co. v. Fleming, 14 Lea, 128; Peabody v. Oregon Ry. etc. Co., 21 Or. 121; Poulin v. Canadian Pac. Ry. Co., 52 Fed. Rep. 197; Mosher v. St. Louis etc. Ry. Co., 127 U. S. 390; 23 Fed. Rep. 328; Frederick v. Marquette etc. R. Co., 37 Mich. 342; 26 Am. Rep. 531; Yorton v. Milwaukee etc. Ry. Co., 54 Wis. 234; 41 Am. Rep. 23; Townsend v. New York Cent. etc. Ry. Co., 56 N. Y. 295; 15 Am. Rep. 419; Hibbard v. New York etc. R. Co., 15 N. Y. 455; McGowan v. Morgan's etc. Co., 41 La. Ann. 732; 17 Am. St. Rep. 415; Shelton v. Lake Shore etc. Ry. Co., 29 Ohio St. 214; Downs v. New York etc. Ry. Co., 36 Conn. 287; 4 Am. Rep. 77; St. Louis etc. Ry. Co. v. Brown, 62 Ark. 254; Rose v. Wilmington etc. Ry. Co., 106 N. C. 168; Bradshaw v. South Boston Ry. Co., 135 Mass. 407; 46 Am. Rep. 481.

Some modifications of the rule, as contended for by each party to the controversy, have been attempted, but efforts to reconcile the two have not, so far, been crowned with any great degree of success. There is this much to be said, however, and that is that the tendency of more recent decisions is toward at least a conservative view of the principle contended for by appellee's coun-

sel; and we adopt that in this case, to wit, that, notwithstanding the conductor has only carried out the company's rules and regulations, and these are reasonable, and he therefore may be exonerated from blame personally, yet, as the company, through its ticket agent acting for it, was guilty of doing that which produced all the injury the plaintiff may have suffered from being put off the train, it is liable for such, and cannot shield itself behind the faithfulness of its servant, the conductor, for its negligence in not delivering a proper ticket to the plaintiff, and has not only injured the plaintiff, if indeed he was injured, but placed the conductor in the attitude of 182 participating in the wrongdoing, while yet performing his duty personally, while of course ignorant of the wrong done to the plaintiff, if any was done.

In the case at bar, the only error committed by the conductor personally, so far as the evidence shows, was in putting plaintiff off the train at another place than a regular stopping place or station, but for this error of itself, if unattended by unnecessary force or ill-treatment, the damages would be only nominal: St. Louis etc. Ry. Co. v. Branch, 45 Ark. 524.

The conduct and manner of the conductor in informing the plaintiff that he would have to pay his fare, for the reason that his ticket did not call for his passage to Malvern, or else get off the train, was equivalent to an expulsion, in the legal sense, and the plaintiff was required to do no more than he did do as a protest against the expulsion, and did right in getting off the train when the same was stopped for that purpose; and not only so, but might not have been justified in making greater resistance, at least further resistance such as might have occasioned further injury to himself. We think, therefore, that plaintiff is entitled to all damages that may have grown out of his expulsion, such as for the delay in completing his journey, for the time and trouble of having to walk back to the Hot Springs depot, and for such humiliation as he was made to undergo by being put off. These damages are all, however, only compensatory, unless the element of malice, recklessness, or wantonness entered into the motive with which the injury was done, if done at all.

In the course of the trial, the court, at the instance of the plaintiff, gave the following instruction over the objection of the defendant, to wit: "7. If you find for the plaintiff, you will assess his damages at a sum that will compensate him for the humiliation and inconvenience suffered by him, if any, by

reason of being expelled from defendant's train; and if, at the time of being expelled from said train, he was on his way to the bedside of a sick brother, in answer to a telegram informing him that his said brother was bad sick, and he notified the conductor in charge of said train of that fact at the time of being expelled from said train, then, if he suffered mental anguish on account of the delay in reaching his said brother, [183] caused by his being expelled from said train, he is also entitled to compensation for such suffering caused by such delay, if any." The mental suffering sought to be made an element of damage in the foregoing instruction has no direct connection with the tortious act which is the basis of the action, but, on the contrary, is remotely connected therewith, and is too remote to enter in the suit as an element of damage. The subject of mental suffering alone as a cause of action was discussed at some length in the recent case of Peay v. Western Union Tel. Co., 64 Ark. 538.

The instruction, for the reason stated, should not have been given, and for this error the judgment is reversed, and the cause remanded, with instructions to proceed not inconsistently herewith. It is unnecessary to consider other matters complained of as errors.

RAILROAD COMPANIES—EXPULSION OF PASSENGERS—LIABILITY FOR.—If, by the fault of an agent of a railroad company, a passenger takes the wrong train, or is without a ticket, or has one that is imperfectly or erroneously stamped, and is ejected for this or any other similar reason, by the conductor of a train, in pursuance of the rules of the company, it is liable to him in tort: Pittsburgh etc. Ry. Co. v. Reynolds, 55 Ohio St. 370; 60 Am. St. Rep. 706; Louisville etc. R. R. Co. v. Gaines, 99 Ky. 411; 59 Am. St. Rep. 465, and notes thereto.

RAILROAD COMPANIES—WRONGFUL EXPULSION OF PASSENGER—MEASURE OF DAMAGES.—In allowing for the wrongful expulsion of a passenger from a railway car, accompanied with undue violence, and by abuse and insult, the jury is entitled to consider the ignominy endured, his mental sufferings, and humiliation, and wounded pride which one in his condition of life and standing in the community would experience: Gorman v. Southern Pac. Co., 97 Cal. 1; 33 Am. St. Rep. 157, and note; Lucas v. Michigan etc. R. R. Co., 98 Mich. 1; 39 Am. St. Rep. 517. As to mental anguish as an element of damages see extended note to West v. Western Union Tel. Co., 7 Am. St. Rep. 534.

EVANS *v.* SPEER HARDWARE COMPANY.

[65 ARKANSAS, 204.]

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—NOTICE.—Knowledge that a note is in the hands of one of the joint makers, to be negotiated for his benefit, is sufficient notice that the other makers signed for accommodation only.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSEMENT.—One who signs negotiable paper for accommodation confers authority on the party accommodated to bind him, the accommodation signer, in favor of third persons by the issue of the paper.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER.—INDORSEMENT in blank by the payee of an accommodation note transfers the legal title, and the note thereafter passes by mere delivery to one who pays value therefor and who has full authority to demand payment of it.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSEMENT.—An indorsement of accommodation paper, without recourse by the payee, who has no interest therein to enable the paper to be negotiated, is not contrary to the usages and customs of commercial transactions.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER—CONSIDERATION.—One who takes negotiable paper in payment of an antecedent debt, before maturity and without notice of any defect therein, receives it in due course of business, and becomes, within the meaning of commercial law, a bona fide holder for value.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—NOTICE.—A BONA FIDE HOLDER for value of accommodation paper taken in the regular course of business may enforce it against the makers, although he knew when he received it that it was accommodation paper.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—TRANSFER—BONA FIDE HOLDER.—An accommodation note put into the hands of the party accommodated solely for the purpose of enabling him to raise money, although made negotiable and payable at and to a particular bank, which is named as the payee, is nevertheless, good against the makers in the hands of a third party who, in good faith, received the note before due and for value, paying therefor the money called for therein.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—DIVERSION OF PROCEEDS.—If accommodation makers of a note sign it to enable the accommodated party to raise money to pay his debts, the fact that the latter diverts the proceeds of the note is no defense as against a bona fide holder of the note for value.

Action to recover on a note signed by E. Hiner, D. B. Castleberry, and J. H. Evans, payable to the order of the Merchants' National Bank, indorsed by it without recourse before maturity, and purchased by the Speer Hardware Company for value and before maturity. Judgment for plaintiff, and the defendants appealed.

Hill & Brizzolara, for the appellants.

I. D. Oglesby, for the appellee.

[209] WOOD, J. There is nothing upon the face of the note to show the status or relation of the signers to each other. Appellants are not indorsers. They do not sign as sureties, but appear upon the face of the paper as makers. The proof, however, shows that appellants are makers for the accommodation of Hiner. The note was in Hiner's hands, to be negotiated for his benefit, which appellee knew. This was sufficient notice to it of the character of the instrument: 1 Am. & Eng. Ency. of Law, 367.

Can appellee, the holder of accommodation paper, having knowledge of its character when it was received, recover of appellants, the makers of such paper? One who signs negotiable paper for accommodation confers authority on the party accommodated to bind him, the accommodation party, in favor of third persons by the issue of the paper. And when such paper has been negotiated, the maker is bound to the payee, indorser, or holder from the date of the instrument, according to the rules of the law merchant: 1 Am. & Eng. Ency. of Law, 2 ed., 340, 350.

The note in suit was a negotiable promissory note, signed by appellants, and turned over to Hiner "for the purpose of getting money on it." They gave it to him to get the sum of three hundred dollars from the bank, but, in the language of one of the appellants, "it was immaterial where he [Hiner] got the money from; they had no objection to where he got the money, and made no restriction; did not tell him from whom he should get it; nothing was said about it." The note was indorsed by the payee in blank. This transferred the legal title. The note thereafter passed by mere delivery to the one who paid value, the same as if payable to bearer, and the holder thereof had full authority to demand payment of it: Story on Promissory Notes, 184. It was immaterial whether the indorsement was procured by Hiner or by the appellee, and that appellee knew the bank had no interest in the note, and only made the indorsement to show title on the face of it. This was done to enable Hiner to do just what the makers designed he should do—"raise money on it." The bank declined to take it, and signified the fact that it had no interest in it, and was willing for anyone else to take it, by indorsing it in blank without recourse, [210] and delivering it back to the maker in this shape, to be negotiated to whomsoever he pleased. We cannot say that the indorsement was out of the usual course, i. e., "contrary to the usages and customs of commercial transactions":

Tiedeman on Commercial Paper, sec. 294; Kellogg v. Curtis, 69 Me. 212; 31 Am. Rep. 273; Daniel on Negotiable Instruments, sec. 778.

Was appellee a bona fide holder for value? The general manager of appellee, who made the negotiation for the note, was informed by Hiner, who had the note, "that the note was made to get money to pay his indebtedness to appellee and other money he owed." There was no infirmity upon the face of the note itself. It had not reached maturity. There was nothing in the circumstances of its holding or transfer to excite suspicion, or to give notice of anything except the character of the instrument. Appellee took it to enable Hiner to do what he informed appellee the makers designed that he should do. Appellee paid Hiner in cash the sum of two hundred and twelve dollars or two hundred and thirteen dollars, and applied the balance of the note on Hiner's debt to it. This court in Tabor v. Merchants' Nat. Bank, 48 Ark. 454, 3 Am. St. Rep. 241, said that "one who takes negotiable paper in payment of an antecedent debt, before maturity and without notice, actual or otherwise, of any defect thereto, receives it in due course of business, and becomes, within the meaning of commercial law, a holder for value." The bona fide holder for value or accommodation paper taken in the regular course of business may enforce it against the makers, although he knew when he received it that it was accommodation paper: 1 Am. & Eng. Ency. of Law, 2d ed., 360, note 6.

We are of the opinion, therefore, that appellee is a bona fide holder for value of the note in suit, and as such entitled to recover the full amount sued for.

The foregoing, however, is based upon the assumption that the note was not fraudulently put in circulation, or diverted from the purpose designed by its makers. The appellants contend that, as payee bank declined to discount the note, its transfer thereafter was a diversion, and that therefore the note has no validity in the hands of appellee. The learned counsel for appellants has pressed this view with his characteristic vigor of argument and diligence in the citation of authorities. [211] The cases which he cites from Ohio and Massachusetts support the proposition for which he contends (Clinton Bank v. Ayres, 16 Ohio, 283; Adams Bank v. Jones, 16 Pick. 574), and there are others to same effect; so that it may be said that the authorities are not in accord upon the proposition.

But the weight of authority and the better reason maintain the doctrine we here announce, that an accommodation note put

into the hands of the party accommodated solely for the purpose of enabling him "to raise money," although made negotiable and payable at and to a particular bank, which is named as the payee, is nevertheless good against the makers in the hands of a third party who in good faith received the same before due and for value, paying for same the money which the note calls for: Winters v. Home Ins. Co., 30 Iowa, 172; Laub v. Rudd, 37 Iowa, 618; Bank of Burlington v. Beach, 1 Aik. 62; Keith v. Goodwin, 31 Vt. 268; 73 Am. Dec. 345; Bank of Montpelier v. Joyner, 33 Vt. 481; Bank of Middleburg v. Bingham, 33 Vt. 621; Bank of Newburg v. Richards, 35 Vt. 281; Farmers' etc. Bank v. Humphrey, 36 Vt. 554; 86 Am. Dec. 671; Bank of Chenango v. Hyde, 4 Cow. 567; Powell v. Waters, 17 Johns. 176; Smith v. Moberly, 10 B. Mon. 271; 52 Am. Dec. 543; Meeker v. Shanks, 112 Ind. 207; Dunn v. Weston, 71 Me. 270; 36 Am. Rep. 310; Bank of Newburg v. Rand, 38 N. H. 166; Utica Bank v. Ganson, 10 Wend. 315; Moreland v. Citizens' Sav. Bank, 97 Ky. 211; First Nat. Bank v. Wood, 7 Tex. Civ. App. 554; Gilbert v. Duncan, 29 N. J. L. 133; Purchase v. Mattison, 6 Duer, 587; Reed v. Trentman, 53 Ind. 438; Morris v. Morton, 14 Neb. 358; Lord v. Ocean Bank, 20 Pa. St. 386; 59 Am. Dec. 728; Perkins v. Ament, 2 Head, 110. See, also, following textwriters: 1 Daniel on Negotiable Instruments, sec. 792; 2 Parsons on Notes and Bills, 28; 1 Am. & Eng. Ency. of Law, 2d ed., 381; Bigelow on Bills and Notes, 457.

The testimony of appellants themselves makes it clear that they did not make the discount of the note by the bank a condition precedent to the validity of the note. Simply naming the bank as payee did not have that effect. The reasoning of the Ohio court in Clinton Bank v. Ayres, 16 Ohio, 283, which holds the contrary doctrine, is as follows: "The makers [sureties] might be willing to loan their credit and become indebted to some particular creditor, but not to another. They might be willing to lend their name to procure a loan from a party who would [212] advance to their principal the full face of the note, when they would be entirely unwilling to go security to one who was their personal enemy, or who would exact harsh terms or heavy interest of their principal. They might have been willing to aid him in procuring a loan of ready cash, when they would have been unwilling to become his surety for an old debt," et cetera. This reasoning is not satisfactory to us, for when one makes his paper negotiable he contracts with reference to the law applicable to such paper. Even had the bank in the case

at bar discounted the note the next instant by an indorsement such as we have here, it might have passed it into the hands of the very persons with whom, according to the reasoning of the Ohio case, the makers were unwilling to contract.

In Keith v. Goodwin, 31 Vt. 274, 73 Am. Dec. 345, it is said: "When a note is executed for the purpose of raising money in the market, although made payable to a particular firm or bank, it is well understood that this is generally regarded by business men as rather a formal than a substantial part of the note. If the note were made payable at a particular bank to the order of the makers, it would be much the same thing. So, too, if made payable to bearer generally. The name of the person to whom the note is payable is mere form. It is understood that it is going into the market as money, and in exchange for money to any party who will make the discount. If negotiated at the bank, it may pass into other hands the next hour." This is the sound doctrine, where the law merchant is untrammelled in its operations by statutory enactment.

But it may be said that the note was used in part to pay a pre-existing debt of eighty-eight dollars or eighty-nine dollars, and that this constituted a material diversion. If this were true it could only defeat appellee's right of recovery pro tanto. But the payment of the antecedent debt by Hiner, under the circumstances, was not a diversion. The gravamen of appellants' case, as they show by their proof, is not that the Speer Hardware Company purchased the note, for they were willing for anyone to purchase who would pay the money for it, but that Hiner failed to pay over the proceeds according to promise. Had Hiner paid over the two hundred and twelve dollars or two hundred and thirteen dollars, all the debts which he agreed to pay as the condition upon which appellants signed would have been full paid. He [213] agreed to pay, for one of the appellants, a sum amounting to one hundred and ninety dollars, and for the other, a sum amounting to fifty dollars; besides, for both, interest on certain notes, amount not stated. He paid the amount of one hundred and twenty dollars. So that the balance on the debts which Hiner agreed to pay as a condition upon which the appellants signed the notes does not equal the amount which Hiner received from the appellee after paying to it his debt. Appellants are not prejudiced, therefore, by reason of appellee's not paying to Hiner the sum of eighty-eight dollars or eighty-nine dollars, but by reason of Hiner's failure to apply the two hundred and eleven dollars or two hundred and twelve dollars to the debts which he promised appellants to pay.

Moreover, appellee had no notice of any limitations upon the use of the note. In fact, there were none, except that it was to "raise money." If appellee had paid to Hiner the sum of three hundred dollars in cash, and Hiner had immediately paid back to appellee the sum of eighty-eight dollars or eighty-nine dollars, the amount of his debt, no one could contend that this would defeat appellee's right to recover. What actually took place was tantamount to this. Hiner informed appellees that the real purpose of the note was to raise money to pay off his debt to appellee and other debts; so appellee deducted the amount of its debt, and paid Hiner the balance. Appellee was in no sense responsible for the misappropriation of the proceeds of the note by Hiner. Appellants trusted Hiner with the note to raise the money. They must be held to have trusted him to make proper application of it: Tabor v. Merchants' Nat. Bank, 48 Ark. 454; 3 Am. St. Rep. 241; Brooks v. Hey, 23 Hun, 372; Gray v. Bank of Kentucky, 29 Pa. St. 365; Moreland v. Citizens' Sav. Bank, 97 Ky. 211; Dunn v. Weston, 71 Me. 270; 36 Am. Rep. 310. Especially is this the case as against one who had no notice that the accommodation makers were interested in the application of the proceeds. As was said in one of the above cases, to hold otherwise "would be against the plainest principles of equity, as well as subversive of the commercial law": See, also, Stoddard v. Kimball, 6 Cush. 469; Goodman v. Simonds, 20 How. 343, and note the same case, in Bigelow on Bills and Notes.

In this view of the case, the other interesting questions pass out, and the judgment must be affirmed. It is so ordered.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSEMENT—RIGHTS OF TRANSFEREES.—The very purpose of making accommodation paper is that the party favored may dispose of it, and, unless restricted, he may transfer it either before or after maturity, and the maker or indorser will be equally bound. The only safe rule is, that when a note is given without restriction as to the time or mode of using it by the person accommodated, and it has been transferred in good faith and in the usual course of business, the holder, if he paid a valuable consideration for it, will be entitled to recover the full amount, although he had full knowledge that it was accommodation paper: See monographic note to Altoona Second Nat. Bank v. Dunn, 31 Am. St. Rep. 745. An indorser is not relieved from liability by the fact that the purchaser or indorser of the note had knowledge that such indorser had no interest in the transaction: Bank v. Looney, 99 Tenn. 278; 63 Am. St. Rep. 830; and the indorsee may enforce it against the prior parties to the same extent as if it had been executed for value, if his immediate indorser was entitled so to enforce it: Cottrell v. Watkins, 89 Va. 801; 37 Am. St. Rep. 897.

NEGOTIABLE INSTRUMENTS TAKEN FOR ANTECEDENT DEBTS—RIGHTS OF HOLDERS.—One who takes a note before

maturity, without notice, and in absolute payment of an antecedent debt, is regarded as a bona fide purchaser for value though the debt discharged is but a simple contract debt and no security is surrendered: Fitzgerald v. Barker, 96 Mo. 661; 9 Am. St. Rep. 375; Tabor v. Merchants' Nat. Bank, 48 Ark. 454; 3 Am. St. Rep. 241, and note.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSEMENT — DIVERSION FROM PURPOSE.—As against a holder for value, an accommodation maker of a note can defend only on the ground of actual payment: Philler v. Patterson, 168 Pa. St. 468; 47 Am. St. Rep. 896, and note. Fraudulent diversion of accommodation paper from the purpose for which it was drawn is no defense to an action by a bona fide holder for value and without notice before maturity: See monographic note to Altoona Second Nat. Bank v. Dunn, 31 Am. St. Rep. 748, 749, on the rights and liabilities arising from accommodation paper.

DUFFY v. HARRIS.

[65 ARKANSAS, 251.]

HOMESTEADS—RIGHT OF WIDOW TO—FORFEITURE BY MISCONDUCT.—Under a constitutional provision that "if the owner of a homestead die, leaving a widow but no children, and said widow has no separate homestead in her own right, the same shall be exempt," such widow does not, by her abandonment of and living apart from her husband in another state, forfeit her right to his homestead upon his death, however reprehensible her conduct morally may have been.

J. P. Brown, for the appellant.

McCulloch & McCulloch, for the appellee.

253 HUGHES, J. The homestead provision for the widow (Const. 1874, art. 9, sec. 6) is as follows: "If the owner of a homestead die, leaving a widow but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents and profits till each arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares go to the younger children, and then all go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow, all of said homestead shall be vested in the minor children of the testator or intestate."

It would seem that the language of this section of the constitution settles the question involved in this suit. The appellee

had never been divorced from her husband, and she was unquestionably his widow. How, then, can she be debarred of her homestead right, without reading into the constitution an exception or provision it does not contain, to the effect that if the wife abandon her husband, and is guilty of immoral and unwifely conduct, she shall forfeit her right thereby to the homestead? We think such a construction unwarranted and untenable. We are aware that it has been held otherwise in Texas and some other states: Trawick v. Harris, 8 Tex. 312; Earl v. Earl, 9 Tex. 630; Sears v. Sears, 45 Tex. 559; Prater v. Prater, 87 Tenn. 78; 10 Am. St. Rep. 623; Farwell Brick etc. Co. v. McKenna, 86 Mich. 283. On the other hand, we find that in the case of Meader v. Place, 43 N. H. 308, and cases therein cited, it is held that the [254] abandonment by the wife of her husband, and living apart from him in another state, does not forfeit her right to the homestead upon the death of her husband.

In this state it is held that the domicile of the wife follows that of the husband, and we understand this to be the rule, and that the fact that she abandons her husband, and lives apart from him in another state, will not form an exception, nor cause her to forfeit her right to the homestead. She is not a nonresident, while her husband is a resident. Her legal status, as to this, is governed by that of the husband: Meader v. Place, 43 N. H. 308; Johnston v. Turner, 29 Ark. 280, and cases; Thompson on Homesteads and Exemptions, secs. 73, 77; Atkinson v. Atkinson, 40 N. H. 249; 77 Am. Dec. 712.

"The wife, though living separate, might have returned to her duty at any time." He owed her protection and support, as long as the relation of husband and wife existed by law, and the desertion of the wife could not alter his legal status. He was still the head of a family, entitled to a homestead; and, as long as the relation of husband and wife existed de jure, the appellee was his wife, and at his death was his "widow," and entitled, under the constitution, to the right of homestead: Const. 1874, art. 9, sec. 6; Gates v. Steele, 48 Ark. 539; Stanley v. Snyder, 43 Ark. 429.

A majority of the court is of the opinion that, under the constitution and laws of this state, the appellee is, in law, the widow of Dan Harris, and that she has not, by her abandonment of him and living apart from him in another state, forfeited her right to his homestead, however reprehensible her conduct morally may have been.

The judgment of the circuit court is therefore affirmed.

HOMESTEAD—RIGHTS OF WIDOW.—The wife's removal from the homestead during her husband's lifetime does not impair her right to have the premises assigned to her after his death: Atkinson v. Atkinson, 4 N. H. 249; 77 Am. Dec. 712, and note. In Texas, it is held that where a wife without good cause voluntarily abandons her husband for several years preceding his death, she forfeits her right to the homestead and widow's allowance: Extended note to Succession of Christie, 96 Am. Dec. 414. **Compare Prater v. Prater, 87 Tenn. 78; 10 Am. St. Rep. 623.**

MEYER *v.* MISSOURI GLASS COMPANY.

[65 ARKANSAS, 286.]

ATTACHMENT—VALIDITY OF LEVY.—To make a valid levy in attachment upon a stock of goods capable of manual delivery, it is necessary for the officer to take the goods into his custody and actual possession.

ATTACHMENT—VALIDITY OF LEVY—PRIORITY.—A constable who, acting under a writ of attachment, and upon being denied the use of the key, by the owners of a locked storehouse, stations himself near such store at night, declares that he has made a levy upon the goods therein, and that he will break and enter the store the next morning, does not make a valid levy, and such levy is not good as against the levy of a sheriff, made the next morning, by taking the goods in the store into his custody and possession.

Contest between creditors concerning the priority of their attachment liens. One attempted levy was made by a constable as detailed in the opinion. The other levy was made by the sheriff by taking the goods into his custody and possession before the constable gained an entrance into the store in which the goods were kept. Judgment for the claimants under the constable's attempted levy, and the claimants under the sheriff's levy appealed.

Williams & Arnold, for the appellants.

Figures & Pruitt and T. E. Webber, for the appellees.

289 RIDDICK, J. We are of the opinion that the constable did not make a valid levy upon the goods in the store prior to that made by the sheriff. The stock of goods was capable of manual delivery, and to make a valid levy thereon it was necessary for the officer to take the same into his custody: Sandel's and Hill's Digest, sec. 336.

The custody of the property in such a case must be an actual possession; there must be actual control with power of removal. It is not sufficient for the officer to take a constructive possession, or to declare that he has taken possession and levied upon

the goods, when in fact they are in a locked storehouse, to which another holds the key, and into which the officer has not effected an entrance, so that he can see the goods, [290] and ascertain their kind and quantity: Haggerty v. Wilber, 16 Johns. 287; 8 Am. Dec. 321; Rix v. Silknitter, 57 Iowa, 262; Evans v. Higdon, 1 Baxt. 245; Rorer on Judicial Sales, sec. 1005; 8 Ency. of Pl. & Pr. 531, and cases cited.

In this case the constable, being denied the use of the key by the owners of the store, levied upon certain chattels in front of the store. He then stationed himself near the store, declared that he had levied upon the goods in the store, and said that he would break and enter the store in the morning. These facts show an unmistakable intention to make a levy, but an intention to levy is not sufficient. There must be a real levy by taking actual possession and control of the goods; and, in the absence of such a possession, a declaration by the officer that he has levied amounts to nothing. The goods here were in a locked storehouse, to which the owner held the key. The constable had not effected an entrance into the store, thus showing conclusively that he had not gained control of the goods with power of removal. He had no means of knowing what goods were in the store, and, if they had been destroyed or stolen, he could not have described them. If the constable believed that he had levied upon the goods inside the store to which he had not gained access, and had not seen, he was mistaken. Although this mistake was one that even a lawyer, called to act on the spur of the moment, might make without subjecting himself to just criticism, it was fatal to the chain of priority made by the appellees.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

ATTACHMENT—VALID LEVY—WHAT CONSTITUES. — To constitute a valid levy of an attachment, the officer levying it must take actual possession of the property attached as far as, under the circumstances, practicable. He must put himself in position to, and must, in fact, assert and enforce a dominion over the property adverse to, and exclusive of, the attachment debtor, and such property must be in his substantial presence: Jones Lumber etc. Co. v. Faris, 6 S. Dak. 112; 55 Am. St. Rep. 814. A levy may be sufficient though the officer does not take manual custody of the property: Corniff v. Cook, 95 Ga. 61; 51 Am. St. Rep. 55, and note. But a levy of goods is not accomplished until the officer has done some act with reference to the goods which would, but for the writ, amount to a trespass: Hibbard v. Zenor, 75 Iowa, 471; 9 Am. St. Rep. 497. See extended note to Hollister v. Goodale, 21 Am. Dec. 677; Sinsheimer v. Whitely, 111 Cal. 378; 52 Am. St. Rep. 192.

MERRILL v. HARRIS.

[65 ARKANSAS, 355.]

HOMESTEADS OF MINORS—SALE BY PROBATE COURT. A probate court in which a guardianship of minors is pending has power to order the sale, for their benefit, of the homestead left to them by their surviving parent.

Hill & Auten, for the appellant.

Ratcliffe & Fletcher, for the appellees.

356 BUNN, C. J. The only question presented by this record is, "has a probate court, in which a guardianship of minors is pending, the power to order the sale of the homestead left them by the mother (the surviving parent) for the benefit of said minors?"

Lucy M. Fulton died seised and possessed of lots 1 and 2 in block 17 in the city of Little Rock, and occupied the same and the improvements thereon as her homestead until the day of her death, her husband having died previously. So far as this record shows, she left no other property and no debts, and no children except her minor sons, Chester and Freddie, named in the caption, who were nineteen and seventeen years respectively at the institution of this suit. After the mother's death, and before the institution of this suit, the duly appointed and acting guardian of these minors, presumably on proper showing, was ordered and directed by the probate court to sell in the usual manner the said homestead property as that of the estate of said minors, and for their benefit; and the sale was accordingly made, and one W. H. Halliburton became the purchaser, and he subsequently sold to appellee Harris, who took immediate possession under his deed, and was in possession at the institution of this suit, which is a suit in ejectment to eject him from the premises. The foregoing facts appear in the complaint, to which the defendants interposed a general demurrer, raising the question stated at the outset, which demurrer was sustained, and the plaintiff appealed to this court.

357 This is a new question in this court, so far as we have been able to ascertain, and withal a question which, from the very nature of things, has not been very often presented in any of the courts, and for that reason precedents are not numerous. All the cases, without exception, we believe, which have been called to our attention by the appellant's counsel are cases of sales or attempted sales under the orders of probate court, at

the instance of administrators, to pay debts of the deceased owners of the homestead property; and none of them are cases where the object of the sales was to appropriate the proceeds to the support and education of the minor or minors, or for his or their benefit in any way. That the homestead, during the holding of the widow or the minority of any of the children, cannot be sold to pay the debts of the father's estate goes without further controversy in this state; and the same is to be said of the sale of the homestead left by the mother, as in this case, for her acts during the minority of her children or any of them. But the question is, Can the probate court, in any case, lawfully order the sale of such homestead for the benefit of the minor children, who enjoy it as a descended or transmitted homestead from the deceased homesteader?

In Morton v. McCanless, 68 Miss. 810, the supreme court of Mississippi said: "The whole object of the exemption law of 1865 was to preserve the property from creditors, and not to affect the power of the courts to deal with the property as that of the children and heirs of the exemptionist." Such is the view we take of it. The Mississippi law on the subject, while different from ours in some particulars, yet is so far like ours as to render the same principles applicable in all essential particulars. There are several other cases from the same court, which either directly or incidentally sustain the same doctrine. The supreme court of Georgia expresses some doubt as to the power in the probate (chancery) court to sell; but, if it exists, it exists only as cases of sale of other property of the minor: Sloan v. Nance, 45 Ga. 310. See, also, as to sales of interests of remainderman, Jenkins v. Fahey, 73 N. Y. 355; Cooper v. Hepburn, 15 Gratt. 551; Bell v. Clark, 2 Met. (Ky.) 573; Thaw v. Ritchie, 136 U. S. 519.

In discussing this identical question, with the foregoing [358] decisions, as well as others on the subject in mind, Woerner, in his work on "The American Law of Guardianship" (section 75), after a general reference to the subject of minor's rights in the homestead, and the sale thereof, has this to say: "Under this aspect of the question, and remembering that a homestead right descending from a deceased parent may be the only property owned by a minor, it would appear that a court having jurisdiction over the estate of such minor should be possessed of the power to order the sale of such homestead rights, if it be necessary for his education, maintenance, or well being." Following the argument of the author, suppose, as in the case at bar, there were no debts, no other property, and that there was but one

child, and he or she, as the case may be, the only child and heir; and, upon that, suppose that the rents and profits of the homestead place were nothing, or not enough to support and educate the child; and that there was no one willing or bound to occupy the premises with the minor, and thus assist in his support and education. In other words, suppose the homestead right was unavailable or utterly inadequate for the purpose. Can it be the law that the probate court, or the court of general, original, and exclusive jurisdiction of minors and their estate, cannot sell the property and thereby give it the only real value it has so far as the minor is concerned? We cannot think such is the law. The constitution does not, in terms, seek to do more than protect from the grasp of creditors. There is neither expressly nor by implication a restriction upon the powers of the probate court in respect to this class of the property of minors. The case we have supposed presents the question fairly, and in such a case we cannot see how but one answer can be given. If one case could exist wherein the probate court would possess the power, that is all that is necessary to solve the question. To carry the discussion further than that would simply be to discuss questions pertaining to the proper or improper exercise of the court's discretion in the instances as they may arise, accordingly as the facts may determine.

In the present case there is no controversy as to an abuse of the discretion of the court, and we therefore affirm the judgment of the court below.

MR. JUSTICE BATTLE dissented and maintained that the order of the probate court directing the sale of the homestead of the minors was void. In support of this contention he affirmed that the homestead interest is a mere right to use and occupy the land as a home or residence, and that the homestead law creates no new estate, but protects the occupant in the use and occupancy of the land set apart as a homestead during the time of such occupancy. Citing Garibaldi v. Jones, 48 Ark. 230; Chambers v. Sallie, 29 Ark. 412; Booth v. Goodwin, 29 Ark. 637: "Hence, 'an estate held in common with others is sufficient to support a homestead exemption, without exclusive possession by the tenant who claims the privilege': Robson v. Hough, 56 Ark. 621; Thompson v. King, 54 Ark. 9; Sentell v. Armour, 35 Ark. 49; Sims v. Thompson, 39 Ark. 301; Ward v. Mayfield, 41 Ark. 94; Stull v. Graham, 60 Ark. 461. A leasehold estate is sufficient for that purpose: Robson v. Hough, 56 Ark. 621; or an equitable title: Rockafellow v. Peay, 40 Ark. 69. Actual occupancy of the infant upon the homestead place is not necessary; is not required of an infant. It is the duty of his guardian to take possession of the homestead place, and to rent or lease it for the benefit of his ward, as a means for his support and education, and this must

have been the possession and occupancy contemplated by the legislature, because it is the only one consistent with the condition of the minor child or children.

"The minor children do not create the homestead. It descends to them. During minority they are incapable of waiving or abandoning it by act or declaration. As it is a mere occupancy, how can they utilize and enjoy it? The question is answered by Booth v. Goodwin, 29 Ark. 637—by their guardian taking possession and renting or leasing it for their benefit, as a means for their support and education. In this way it is held and occupied by them. The occupancy of their guardian or tenant is their occupancy. In case of a sale it would not be so held, but would be abandoned and forfeited.

"The constitution intends and directs that the homestead of the father shall be preserved for the benefit of the minor children, in a particular manner, during their minority, and that is by occupancy or renting. It does not authorize any other disposition to be made of it. It provides that 'if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents and profits, till each of them arrives at twenty-one years of age, each child's rights to cease at twenty-one years of age, and the shares to go to the younger children, and then all go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate': Const. 1874, art. 9, sec. 6. Under this section they are entitled to reside upon it, and to one-half of the rents and profits if there be a widow, that is to say, to rent it till each of them arrives at twenty-one years of age.

"In Kessinger v. Wilson, 53 Ark. 402, 22 Am. St. Rep. 220, the court said: 'The land was set apart by the law to appellants (minors), when their father died, as a home and means of maintenance during their minority. Until the younger of them reached the age of twenty-one years, it could not have been lawfully sold to pay the debts of their father's estate, or partitioned between them. It was not subject to sale, but might have been rented to raise means for their support. Until the younger reached his majority, it remained set apart as "a place, a sanctuary, to which he or she might return to find the shelter, comfort and security of a home" during his or her minority.'

"In Sansom v. Harrell, 51 Ark. 429, the order in question was made by the probate court for the purpose of vesting a homestead in a widow, under a statute which provides: 'When any one shall die, leaving a widow or children, and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order that the estate vest absolutely in the widow or children, as the case may be': Mansfield's Digest, sec. 9. The husband of the widow left minor children surviving him at the time of his death. This court held the order void, and said: 'The constitution sets it apart as a home and sanctuary for the widow and children, and, for the purpose of preventing any other person invading it under a claim of right, or in-

terfering with them in the undisturbed enjoyment of the shelter, comfort, and security of it as a home, guards and protects it against sales and transfers. The same reason which makes it unlawful to sell the land constituting it for the payment of the debts of the deceased owner, subject to the homestead rights of the children, during their minority, makes it unlawful to vest it in the widow, subject to the same rights of the children, during their minority. One endangers the quiet, security, and comfort of a home provided in the homestead as much as the other, and both equally violate the spirit and manifest intent of the constitution.'

"The homestead right of minor children, and the estate in the lands, which constitute the homestead, inherited by them in addition thereto, it was held in Kessinger v. Wilson, 53 Ark. 400; 22 Am. St. Rep. 220, are like two separate and distinct estates vested in different persons and following in immediate succession. Their right to the enjoyment and possession of the same cannot exist at one and the same time; and neither merges in the other. The probate court cannot authorize the sale of the homestead right. For that is a personal right and a sale of it is an abandonment which forfeits it. Neither can it order the sale of the estate inherited in addition to it, subject to the same, for the same reason it cannot be sold for the payment of the debts of the deceased owner; and that is 'one endangers the quiet, security, and comfort of a home provided in the homestead as much as the other, and both equally violate the spirit and manifest intent of the constitution.' "

HOMESTEAD—PROBATE SALE OF—WHEN PROPERTY OF MINORS.—When land owned by a father who leaves minor children was a homestead at the time of his death, a sale thereof made during their minority is void: Kessinger v. Wilson, 53 Ark. 400; 22 Am. St. Rep. 220, and note. An order of a probate court directing the sale of the homestead of a decedent is void if made during the minority of his children, or while his widow is unmarried and has not abandoned the homestead, nor acquired any other in her own right: Bond v. Montgomery, 56 Ark. 563; 35 Am. St. Rep. 119.

KANSAS CITY, PITTSBURG, AND GULF RAILROAD COMPANY *v.* STATE.

[65 ARKANSAS, 363.]

CARRIERS—BAGGAGE.—SAMPLES OF MERCHANDISE. carried for the purpose of making sales of goods are not "baggage," within the meaning of a statute making it a misdemeanor for a railroad company to charge more than a fixed price for transporting excess baggage above a certain amount in weight.

J. McD. Trimble, J. A. Eaton, and C. M. Rice, for the appellant.

E. B. Kinsworthy, attorney general, for the appellee.

[364] BATTLE, J. An act entitled, "An act to regulate charges on excess baggage on all railroads propelled by steam or electricity in this state over five miles in length," approved April 19, 1895, provides:

"Section 1. It shall be unlawful for any railroad in this state, over five miles in length, run by steam or electricity, to [365] charge more than twelve and one-half per cent of the cost of a first-class fare between all points in this state, per hundred pounds, for excess baggage, over (150 lbs.) one hundred and fifty pounds; provided, that the minimum charge for excess, where the same does not exceed two hundred pounds, shall not be less than twenty-five cents.

"Sec. 2. Any such railroad violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction be fined in any sum not less than ten dollars nor more than twenty-five dollars."

The Kansas City, Pittsburg & Gulf Railroad Company was indicted for, and convicted of, a violation of this act, and was fined in the sum of ten dollars.

The facts upon which the conviction was based are as follows: George T. Lincoln, a traveling salesman, purchased of the Kansas City, Pittsburg & Gulf Railroad Company a ticket for transportation over its road from Siloam Springs, in Benton county, in this state, to Gentry, a station in the same county, and paid twenty cents for the same, the price of first-class fare. He had with him four trunks, which contained clothing of various kinds, and weighed in the aggregate nine hundred and seventy pounds. He carried this clothing with him, and used it as samples in making sales of goods of the same description. The railroad company allowed him transportation for one hundred and fifty of the nine hundred and seventy pounds free of additional expense, and charged and received from him one dollar and twenty-five cents for the transportation of the remaining eight hundred and twenty pounds from Siloam Springs to Gentry. The sum received was the amount charged for like articles, when shipped as first-class freight, was a freight rate, and not an excess baggage rate. The trunks were checked like baggage, and accompanied Lincoln upon the same train. The defendant's railroad exceeded five miles in length, and was operated by steam.

Were the four trunks and their contents "baggage." within the meaning of the act of April 19, 1895?

What is baggage, within the rule of the carrier's liability, depends much upon the reason why the passenger is allowed trans-

portation for it as such. There can be but one, and that is because it is necessary or conducive to his convenience and [366] comfort. It is necessary to him, and for that reason it is impliedly, if not expressly, included in every contract of the carrier to transport passengers. "The impossibility of traveling," says Chief Justice Cockburn, "without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveler has led from the earliest times to the practice, on the part of carriers of passengers for hire, of carrying as a matter of course a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger." Hence courts and authors, in defining what is baggage, have embraced this idea in their definitions. Judge Story says that "by baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale, and the like": Story on Bailments, sec. 499. "Baggage," says Chief Justice Cockburn, in Macrow v. Great Western Ry. Co., L. R. 6 Q. B. 612, "is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey." Mr. Justice Field, in Hannibal R. R. Co. v. Swift, 12 Wall. 274, said that the contract of the carrier to carry a passenger, as to baggage, "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." Upon the same principle, the statutes of this state provide: "Each passenger who shall pay fare shall be entitled to have transported along with him, on the same train, and without additional charge, one hundred and fifty pounds of baggage, to consist of such articles as are usually carried by ordinary persons when traveling."

Accordingly, it has been frequently held, as we do now, [367] that merchandise carried for sale, or samples of merchandise carried for the purpose of making sales of goods of the same class, do not come within the description of baggage: Hum-

phreys v. Perry, 148 U. S. 627; Alling v. Boston etc. R. R. Co., 126 Mass. 121; 30 Am. Rep. 667; Mississippi Cent. R. R. Co. v. Kennedy, 41 Miss. 671, 678; Macrow v. Great Western Ry. Co., L. R. 6 Q. B. 612; Hawkins v. Hoffman, 6 Hill, 589; 41 Am. Dec. 767; Hutchings v. Western etc. R. R. Co., 25 Ga. 61; 71 Am. Dec. 156; Texas etc. Ry. Co. v. Capps, 2 Tex. Civ. App. 35; Michigan Cent. Ry. Co. v. Carrow, 73 Ill. 348; 24 Am. Rep. 248; Strouss v. Wabash etc. Ry. Co., 17 Fed. Rep. 209; Pennsylvania Co. v. Miller, 35 Ohio St. 541; 35 Am. Rep. 620; Southern Kansas Ry. Co. v. Clark, 52 Kan. 398; Hutchings v. Western etc. Ry. Co., 71 Am. Dec. 160; Hutchinson on Carriers, secs. 679, 685; Thompson on Carriers of Passengers, 510.

It is true that it is said in Kansas City etc. R. R. Co. v. McGahey, 63 Ark. 348; 58 Am. St. Rep. 111: "When a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give to anyone concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his luggage, and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them in that way." But the act of April 19, 1895, does not apply to goods and chattels which do not come within the description of baggage. The carrier becomes liable for them as baggage by accepting them as such, by his own acts, and not from any obligation to transport them as baggage, which the law imposes upon him. Such property he is not bound to receive except upon the payment of the rates he is allowed to charge for the transportation of the same as freight.

In this case the railroad company was not bound to receive and transport Lincoln's trunks as baggage. It was entitled to compensation for carrying them at the rate it is lawful to charge for the transportation of such property as freight. It received nothing more, and is not guilty of violating the act of April 19, 1895.

Reversed and remanded for a new trial.

CARRIERS—BAGGAGE—WHAT INCLUDED WITHIN.—Baggage is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey: Kansas City etc. Ry. Co. v. McGahey, 63 Ark. 344; 58 Am. St. Rep. 111, and note.

A carrier does not insure the safety of samples of merchandise, delivered by a traveling salesman to him as baggage; yet by receiving, carrying, and putting them into his warehouse for safekeeping, he becomes bound to ordinary prudence in their care: Pennsylvania Co. v. Miller, 35 Ohio St. 541; 35 Am. Rep. 620; Hawkins v. Hoffman, 6 Hill, 586; 41 Am. Dec. 767. For a complete discussion of the matter see extended note to Hutchings v. Western etc. R. R., 71 Am. Dec. 158-163.

GRAY v. PATTERSON.

[65 ARKANSAS, 373.]

HOMESTEADS—WHEN NOT LOST.—A homestead when once acquired, and still occupied by the owner, is not lost by the death of his wife, the arrival of his children at the years of maturity, and their removal from the premises.

HOMESTEADS—ABANDONMENT.—A homesteader who, on account of his advanced age and his inability to procure some one to live with him, takes up his abode with his grown daughter, who lives but a short distance away, and who constantly expresses a desire to return and live at his old home, does not by such removal abandon his homestead.

HOMESTEADS — FRAUDULENT CONVEYANCE OF. — Creditors of a homestead owner cannot attack a conveyance made by him of his homestead, on the ground that such conveyance is fraudulent as to them.

Neill & Neill, for the appellants.

Yancey & Fulkerson, for the appellee.

374 BUNN, C. J. The plaintiffs, Gray Brothers, by bill in chancery seek to set aside a conveyance made by defendant James A. Meacham to his daughter and codefendant, Elizabeth A. Patterson. Decree for defendants on the complaint, answer and testimony in the cause, and the plaintiffs appealed to this court.

The complaint was filed at the fall term, 1895, of the Independence circuit court in chancery, setting up substantially the following facts, to wit: That plaintiffs obtained judgment against defendant Meacham in justice of the peace court, on the 17th of August, 1895, and in due course, after execution issued and returned nulla bona, caused a transcript of said judgment 375 to be lodged and filed in the circuit court of said county; that after the debt was contracted, but before said judgment for the same was rendered, to wit, on the 10th of March, 1894, said Meacham conveyed to his said daughter, for the consideration named in the deed of eight hundred dollars, the following lands lying and being situate in said county, to wit: The northeast quarter of the northwest quarter of section 1, in township 14

north, of range 6 west, the northwest quarter of the southwest quarter and the east half of the southwest quarter of section 36, township 15 north, of range 5 west, containing in all one hundred and sixty acres, and that the same was all the property he owned at the time, of any material value; that the said Elizabeth A. Patterson, at the time of said conveyance to her, had full knowledge of the existence of said indebtednes of her father, the said James A. Meacham, to the plaintiffs, and that the consideration named in said deed from him to her was a mere pretended consideration, and that said conveyance was made in fraud of Meacham's creditors, the plaintiffs among the number. Prayer to set aside the conveyance, and subject the said lands to plaintiffs' said judgment, which at the institution of this suit amounted to two hundred and five dollars.

The answer admits the partnership of plaintiffs, that they obtained judgment against Meacham in justice of the peace court, and that a transcript of same was filed in circuit court, as stated in the complaint, but denies that the consideration of the deed from Meacham to Patterson was a pretended consideration, and, on the contrary, avers the same to have been bona fide; that it was the estimated value of the expenses and services to be borne and performed by Patterson in the care and maintenance of her father, the said Meacham, during his natural life, which was the real consideration, and which she obligated herself to defray and perform for that purpose for him. It denies all knowledge of said indebtedness at the time of the making of said conveyance from Meacham to said Elizabeth A. Patterson, his daughter as aforesaid. It sets up that said Meacham, as the husband and father and head of a family, had occupied said lands as his homestead for more than fifty years next preceding the filing of the same; that a large family of children had been reared thereon, had died, married, and gone from the paternal roof, and finally the wife and mother died, [376] and defendant Meacham, in his advanced age, being about eighty-five years old, after remaining alone upon the homestead about one year after the death of his wife, as a matter of necessity (being unable to care for himself, and failing to induce same to live with him), took up his abode with his said daughter; that it was his constantly expressed desire to return and live in his old home, which was near by, but, failing to procure anyone to live with him there, he finally made the arrangement with the daughter indicated, conveying to her his said homestead lands as his part of the agreement to that end.

The questions presented by this record are: Did Meacham lose his right of homestead by the death and removal of all his family and dependents? Did he subsequently abandon his said homestead after the death and separation of his family, so as to leave the same subject to the payment of his debts; and, if so, what was the act of the abandonment; and, in either case, what was the effect of his action upon his creditors? In other words, did he ever and in fact abandon his homestead until the sale thereof; and, if not, was the sale void as against creditors?

In Stanley v. Snyder, 43 Ark. 432, the court said: "The existence of a family being necessary to the acquisition of a homestead, does a continuation of the right depend on a continuation of the family relation? The decided weight of authority is, that a homestead estate, when once acquired, and still occupied by the owner, is not defeated or lost by the death of his wife or the arrival of his children at the years of maturity. Thus, the Massachusetts statutes of 1855 limited the homestead exemption to a 'householder having a family,' and continued it to the widow and children after his death, but contained no provision as to its continuance in the husband after the death of the wife and departure of the children. Nevertheless, where the owner of certain premises lived upon them with his wife and son at the time of the passage of the act, it was held that he acquired under the statute a homestead estate therein, which was not affected by the subsequent death of his wife and the coming of age and departure of his son, so long as the father continued to occupy the premises as his home. 'Any other construction' (says the supreme court of Massachusetts), 'would render a husband, who had been deprived of his family by accident or disease, [377] or by their desertion without any fault of his, liable to be instantly turned out of his homestead.'" And, construing further: "The constitution, which contains our homestead statutes, has not in express terms anticipated and provided for every possible phase of the question. It therefore devolves upon the courts to construe and apply the law to new cases, as they arise. Interpreting the law according to its spirit, and following the current adjudications, we hold, though with some hesitation, that when the association of persons which constitute the family is broken up, whether by separation or the death of some of the members, the right of homestead continues in the former head of the family, provided he still resides at his old home." The expression, "provided that he still resides at his old home," is to be taken in its legal sense, and not in its literal sense; for it

does not mean to make the continuation of the homestead right dependent upon actual occupancy, but upon such occupancy as a homesteader may successfully show in answer to a charge of homestead abandonment, according to the principle laid down in the books. Thus, although not in actual occupancy of the homestead, yet, if his absence therefrom is only temporary for business or pleasure—and we may add for necessity or convenience—it is still an occupancy: Euper v. Alkire, 37 Ark. 283; Flask v. Tindall, 39 Ark. 571; Marr v. Lewis, 31 Ark. 203; 25 Am. Rep. 553; Brown v. Watson, 41 Ark. 309. But, this being a question of fact, and determined in favor of appellee by the court below, upon evidence sufficient to sustain its findings, the same will not be disturbed here.

Taking this view of the matter, Meacham's homestead right continued up to the time of its sale to his daughter, and therefore we are only called upon to consider whether the plaintiffs and appellants can complain of the sale in any event. The case of Chambers v. Sallie, 29 Ark. 407, arose under the constitution of 1868, upon which a judgment, as in that case, was a lien upon the homestead, and the issuance of an execution thereon was only postponed until the homestead right ceased, when it could be levied, and the homestead sold thereunder. The homesteader could not defeat this judgment lien by sale of the homestad under that constitution. But no judgment is a [378] lien upon the homestead under the present constitution, and this court has said, time and again, that the sale of the homestead is no concern of the creditor; and whatever may be our personal views of the matter, it is settled law, and it were better that it be not reopened for discussion: Bogan v. Cleveland, 52 Ark. 101; 20 Am. St. Rep. 158; Bennett v. Hutson, 33 Ark. 762; Turner v. Vaughan, 33 Ark. 454; Carmack v. Lovett, 44 Ark. 180; Stanley v. Snyder, 43 Ark. 429; Pipkin v. Williams, 57 Ark. 242; 38 Am. St. Rep. 241; Campbell v. Jones, 52 Ark. 493.

This, in our opinion, settles this case. Decree is therefore affirmed.

MR. JUSTICE BATTLE dissented, and, after reciting the facts, said that: "All these facts prove to me that the land in controversy had ceased to be his [Meacham's] homestead long before he conveyed it to his daughter. Meacham was in debt. The land in controversy was all the property he owned. The conveyance of it to his daughter, in consideration that she would take care of and support him for the remainder of his life, was in legal effect a conveyance in trust for himself, and is fraudulent and void as to existing creditors: Woodall v. Kelly, 85 Ala. 368; 7 Am. St. Rep. 57; Annis v.

Bonar, 86 Ill. 128; Bump on Fraudulent Conveyances, 4th ed., sec. 199, and cases cited. But it is said that the land constituted his homestead at the time he conveyed it to his daughter. Admit this to be true, and it is still fraudulent as to existing creditors. No insolvent debtor is entitled to hold any land as free and exempt from sale under execution or other final process, except the land constituting his homestead. When he abandons the homestead, the land ceases to be exempt. He cannot continue the exemption by conveying the land to another to hold in trust for him. As said in Annis v. Bonar, 86 Ill. 128 'the law allows no man, beyond the exemption of the statute, by any form of contract or mode of disposition of property, whatever it may be, to secure the use of the property to himself, to the exclusion of his creditors.'

"When an owner ceases to occupy his homestead, and conveys the land constituting it to another, in consideration that the grantee will support and maintain him for his natural life, he thereby sets it apart to other uses than a homestead, and the grantee thereafter holds in trust for him land which by the abandonment ought to be subject to sale for the payment of his debts. After the conveyance, he stands in no other relation to such land than he does to land that he never held as a homestead, and has conveyed to another for the same purpose. The fact that the land once constituted his homestead does not change the legal effect of the conveyance. The grantee in both cases holds the land for the grantor's benefit, and the effect of the conveyance, if allowed to stand, would enable the grantor to place property, for his own benefit, beyond the reach of his creditors that he is not entitled to hold exempt from seizure and sale under final process; and would thereby enable him, if insolvent, to defraud his creditors. Such being their effect, it follows that the conveyances are fraudulent and void as to the creditors of the insolvent grantor."

HOMESTEAD — ABANDONMENT — WHAT CONSTITUTES. Removing from a homestead and residing elsewhere temporarily for the purpose of business, health, or pleasure, does not work an abandonment of the homestead unless there is coupled with such removal an intention not to return, or there is formed, after such removal, an intention of remaining away: Edwards v. Reid, 39 Neb. 645; 42 Am. St. Rep. 607; Kaes v. Gross, 92 Mo. 647; 1 Am. St. Rep. 767. See monographic note to Taylor v. Hargous, 60 Am. Dec. 607.

FRAUDULENT CONVEYANCES—CONVEYANCE OF HOMESTEAD.—A transfer of a homestead cannot be fraudulent as against creditors of the grantor, because they have no right to resort to it for payment of their demands: Pipkin v. Williams, 57 Ark. 242; 38 Am. St. Rep. 241; Bank of Versailles v. Guthrey, 127 Mo. 189; 48 Am. St. Rep. 621; McDannell v. Ragsdale, 71 Tex. 23; 10 Am. St. Rep. 729.

De Loach Mill Manufacturing Company v. Little Rock Mill and Elevator Company.

[65 Arkansas, 467.]

ATTACHMENT—INTERVENTION—ESTOPPEL.—One who, after a sale under attachment, but before payment of the proceeds, files an interplea claiming title to the property sold, or the proceeds thereof, is not estopped to prosecute his claim by independent suit because of the judgment in the original suit, to which he was not a party, discharging the attachment and giving defendant therein damages.

EXECUTION SALES.—SATISFACTION OF JUDGMENT WHEN SET ASIDE.—If a plaintiff purchases property at his own execution sale, and satisfies his judgment against the execution defendant pro tanto out of the proceeds, he is entitled to have such satisfaction annulled, upon his being subsequently compelled to account to a third person as the owner of such property.

Intervention in an attachment suit. The Little Rock Mill and Elevator Company brought an action against the Texarkana Grain, Lumber, and Machinery Company and sued out a writ of attachment, which was levied upon a sawmill and a cornmill belonging to the De Loach Mill Manufacturing Company, and upon other property of the defendants in the attachment. The property attached was sold under an order of sale made by the judge in vacation, and the mills were purchased by the Little Rock Mill and Elevator Company for four hundred and seventy-five dollars, but were not paid for. Before the proceeds of the sale were paid in, or other steps taken in the case, the De Loach Mill and Manufacturing Company filed an interplea, claiming title to the property and praying for the proceeds of the sale of such mills. The trial court gave judgment for the debt sued for, discharged the attachment, gave the defendant in attachment damages in the sum of two hundred dollars for a wrongful attachment, this being the difference between the value of the property attached and what it sold for, and ordered that such damages be credited on the judgment and directed the sheriff to pay the proceeds of the sale of the attached property to the attachment defendant. Such proceeds were not paid over pending an appeal, which resulted in an affirmance of the judgment of the trial court. In the mean time no answer had been filed to the interplea. Subsequently, by the consent of the parties, an answer was filed. It failed to deny the ownership of the interpleader, but set up, as a defense, the facts in the original suit, and the judgment therein as an estoppel to claim the pro-

ceeds of the sale of said mills. Judgment for the plaintiff in the original attachment suit, and the interpleader appealed.

Williams & Arnold, for the appellant.

L. A. Byrne, for the appellee.

469 HUGHES, J. The question of estoppel was the only question considered and decided by the circuit court between the interpleader and the original plaintiff. The interpleader's title seems to have been admitted. It was not disputed. There was no answer denying it. Was the interpleader estopped? The interpleader was not a party to the original suit.

Speaking of an interplea, in Berlin v. Cantrell, 33 Ark. 611, Chief Justice English said, in substance, that it was in the nature of a cross action for the property claimed, and was the interpleader's suit, in which, in legal effect, the interpleader was the plaintiff. Chief Justice Cockrill said, in Sannoner v. Jacobson, 47 Ark. 31, that the intervening suit is a separate one. "As such is its nature, we think the pleadings in it must be governed by rules applicable to similar pleadings in other actions: Boone on Code Pleadings, sec. 159. Our conclusion, therefore, on this point is that the court erred in refusing to require a written answer to the interplea of the appellant": Rosewater v. Schwab Clothing Co., 58 Ark. 446, 451.

"In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits." 470 Hughes v. United States, 4 Wall. 236. It must either appear on the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. When the record leaves the matter in doubt, extrinsic proof is admissible to show that the same point was adjudicated in the former suit: Russell v. Place, 94 U. S. 606; 1 Freeman on Judgments, sec. 256.

Chief Justice Watkins, in Hershey v. Clarksville Inst., 15 Ark. 128, said: "According to what seems to be the proper construction of the statute concerning attachments, the claimant, other than the defendant, of personal property seized under the writ, and who has been summoned as garnishee, may prosecute his claim to the property as an independent proceeding, and without reference to any controversy between the parties, the determination of it not affecting the right of property be-

tween the defendant in the attachment and the claimant or third persons": Mitchell v. Woods, 11 Ark. 180. The interpleader in the case at bar fully put the plaintiff on notice by filing his interplea.

The statute (Sandels & Hill's Digest, sec. 372) provides: "Any person may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or of any attached debt, present his complaint, verified by oath, to the court disputing the validity of the attachment, or stating a claim to the property, or an interest in or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded, and his claim shall be investigated."

The interpleader filed his claim to the proceeds of the sale of his mills, in accordance with this statute. His title to the property was never denied or controverted. The interpleader was not estopped to claim the proceeds, which amounted to four hundred and seventy-four dollars, and it is entitled to this amount, with interest thereon.

The satisfaction of the plaintiff's judgment pro tanto may be set aside as to the proceeds of the interpleader's property, to which the defendant in the attachment had no title, it having been procured without gain to the plaintiff or loss to the defendant. The satisfaction pro tanto was apparent, but not [471] real: Jones v. Arkansas etc. Co., 38 Ark. 28; Freeman on Executions, secs. 54, 352.

The judgment is reversed, and cause is remanded for further proceedings consistent with the opinion.

ATTACHMENT—RIGHTS OF THIRD PERSONS IN PROPERTY—INTERVENTION.—Persons claiming property which has been seized under attachment are not compelled to intervene in the attachment suit and try their right of property there, but may maintain an independent action to recover their value: Harris v. Tenny, 85 Tex. 254; 34 Am. St. Rep. 796.

EXECUTION—SALES UNDER—PLAINTIFF AS PURCHASER. Where land has been levied upon and sold as the property of the judgment debtor, but to which he has no title, the purchaser, whether the judgment creditor or a stranger, may recover from such debtor the purchase price of said real estate which has been credited on the judgment: Reed v. Crosthwait, 6 Iowa, 219; 71 Am. Dec. 406; Muir v. Craig, 3 Blackf. 293; 25 Am. Dec. 111. Compare Riley v. Martinelli, 97 Cal. 575; 33 Am. St. Rep. 209.

COLE *v.* METTE.

[65 ARKANSAS, 503.]

EQUITY—JURISDICTION—RECOVERY OF LAND.—Courts of equity have no jurisdiction of suits brought merely to recover the possession of land and to establish one legal title against another conflicting legal title, even though a question concerning the priority of liens is involved.

PARTNERSHIP—DEED TO—SUFFICIENCY OF.—A conveyance of land to two partners by their firm name, consisting of a union of their surnames, is sufficient to convey the legal title to such partners.

APPELLATE PRACTICE—IMPROPER TRANSFER OF LAW CASE TO EQUITY.—The transfer of a law case to equity over objection, whereby the objecting party is deprived of the right to have a question of law submitted to the jury, is prejudicial and reversible error.

C. Wall, for the appellants.

Luna & Johnson, for the appellees.

504 RIDDICK, J. The controversy in this case concerns the title to two lots in the town of Paragould, and the improvements thereon. The litigation was commenced by an action of ejectment brought by appellees, Louis Mette and George Kanne, to 505 recover of appellants, Cole and Wall, possession of such lots. Appellant Cole was at one time the owner of the lots, and Mette & Kanne base their right to recover upon a sheriff's deed made in pursuance of a sale of such lots under an execution against Cole. On the other hand, the appellant Wall denied the validity of the title set up by appellees, and claimed to be the owner of the land by virtue of a mortgage executed by Cole, which had been foreclosed, and the lots purchased by Wall. Both parties set up a legal title to the land, but the circuit court, on motion of Mette & Kanne, and over the objection of Cole and Wall, transferred the case to the equity docket. The case was there heard, and judgment rendered in favor of Mette & Kanne for the possession of the lots. Wall and Cole appealed, and the first question presented arises on the exceptions of appellants to the order of the court transferring the case to the equity docket.

Counsel for appellees, as a reason for the transfer of the case to the equity docket, assert that a question of priority of liens was involved. But courts of equity do not have jurisdiction of suits brought merely to recover possession of land, and to establish one legal title against another conflicting legal title, even though a question concerning liens be involved. It avails

nothing that in such a contest the owner of one legal title undertakes to establish its superiority over the opposing legal title by showing that the execution lien and sale upon which it is based were prior, in point of time, to the mortgage lien and sale upon which the title of his adversary is based. Such matters furnish no ground of equity jurisdiction, for, to call forth the interposition of a court of equity, it is imperative that equitable relief be asked: Ashley v. Little Rock, 56 Ark. 391; Fussell v. Gregg, 113 U. S. 550. The equitable doctrine of priorities, of which counsel speak, has no application in a contest between opposing legal titles to the same tract of land, such as we have here: 2 Pomeroy's Equity Jurisprudence, secs. 679, 681, 735.

Counsel for appellees cite the case of Percifull v. Platt, 36 Ark. 456, as supporting the jurisdiction of the court of equity in this case. That was an action of ejectment in which the plaintiff recovered judgment at law. The plaintiff had only an equitable title, and the judgment was reversed on that ground; 506 this court holding that he could not support the action of ejectment upon an equitable title, but must seek his remedy in chancery. In the case at bar, the plaintiffs have, or at least claim, a legal title, and in this respect the two cases are easily distinguished.

In saying that the appellees claim under a legal title we do not forget the contention of appellants that the deed of the sheriff was not sufficient to vest a legal title in appellees, for the reason that in such conveyance they were described only by their firm name of Mette & Kanne, and we will now proceed to state our grounds for not concurring in that contention.

It was decided by this court in Percifull v. Platt, 36 Ark. 456, that if a partnership name contained the name of one partner only, a conveyance to the partners by their firm title would vest the legal title in the one partner whose name appeared in the firm name, and that if the deed be to a partnership name, which includes the name of no party, it passes nothing at law. But in this case the partnership name contains the surname of both partners, and, although their christian names are omitted, we still think the deed sufficient in form to vest the legal title in such partners. If there be any uncertainty in the description, it is what the law denominates a latent ambiguity, and parol evidence may be introduced to remove the same and identify the grantees. The law on this point can hardly be better stated than it was by the supreme court of Vermont in Morse v. Carpenter, 19 Vt. 613. "There is," said Chief Jus-

tice Royce in that case, "an important difference between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable, on that account, of different applications. To correct the one is, in effect, to add new terms to the instrument; which to complete the other is only to ascertain and fix the application of terms already contained in it. Indeed, the most usual and approved description of the grantee—that which gives his christian and surname and the town in which he lives—may prove to be imperfect, as others bearing both those names may be living in the same town. And if the christian name or place of residence be omitted, the description is only rendered the more imperfect; it is less certain than it might be, or usually is, [507] made. But a grantee is still designated, though imperfectly, and, for aught that the deed discloses, the party accepting the conveyance may be the only person answering the description given. In all these cases, a resort to extraneous facts and circumstances may become necessary, in order to ascertain the individual to whom the description was intended to apply; but it is not perceived that the greater or less probability of this should, in either case, affect the validity of the deed." The law, as thus announced by the learned court, is fully sustained by later decisions: Beaman v. Whitney, 20 Me. 413; Menage v. Burke, 43 Minn. 211; 19 Am. St. Rep. 235; Sherry v. Gilmore, 58 Wis. 324; Jones v. Neale, 2 Pat. & H. 339; 1 Jones on Real Property, sec. 244; 1 Dembitz on Land Titles, 335.

It has been held that a deed to one person, describing him by his surname only, is not for that reason void (Fletcher v. Mansur, 5 Ind. 267), and there are stronger reasons why a deed to two partners by their firm name, when the same consists of a union of their surnames, as in the case of appellees, Mette & Kanne, should not be held void on account of ambiguity as to the grantees; for the union of their surnames alone in the deed indicates that the parties mentioned were partners doing business under that firm name, and serves to point out and identify the persons thus described. When we consider how easily the grantees could be identified in such a case, we see the futility of the argument against the validity of the deed to Mette & Kanne. We therefore hold that this deed was sufficient in form to vest the legal title in the partners, Lewis Mette and George Kanne.

The case then stands that we have here a plain action of ejectment to recover possession of land. No equitable relief was required, and none was asked by either party. It follows,

therefore, that the court erred in transferring such cause from the law to the equity docket.

The facts, as presented in the transcript before us, show that the decision of the controversy as to the title to this land turns mainly on the question whether Cole had abandoned his homestead in the premises before the levy and sale upon which the deed of Mette & Kanne was based, and under which they claim. With the exception of this question of abandonment, there seems to be no dispute as to the facts, and little room for [508] doubt as to the law. But this was a question of fact that the appellants had the right to submit to a jury, and the transfer to equity over their objections, by which they were deprived of this right, was prejudicial error: Ashley v. Little Rock, 56 Ark. 391; Sandels and Hill's Digest, sec. 5617.

The judgment is therefore reversed, and the cause remanded for trial at law.

EQUITY—JURISDICTION TO TRY TITLES.—In equitable suits, title to realty may sometimes be tried on the principle that jurisdiction, having once attached, shall be made effectual for the purposes of complete relief: See monographic note to King v. Mason, 89 Am. Dec. 428. It is well settled that equity has no jurisdiction to settle the title and boundaries of land where the plaintiff has no equity against the party who is holding the land: Note to Smith v. Gardner, 53 Am. Rep. 347. See Humboldt Co. v. Lander Co., 22 Nev. 248; 58 Am. St. Rep. 750, and note.

DEEDS TO PARTNERSHIPS.—As a partnership is not a person, it is impossible for it, as a partnership, to hold the legal title to real estate: See monographic note to McCormick's Appeal, 98 Am. Dec. 197. However, though at law a deed made by or to a partnership in the firm name, the full name of neither partner being given, will not pass title to the land, such is not the rule in equity, where the equitable title is deemed to pass: Frost v. Wolf, 77 Iowa, 455; 19 Am. St. Rep. 761. See Menage v. Burke, 43 Minn. 211; 19 Am. St. Rep. 235, where a different holding was made as to a mortgage.

McCRACKEN *v.* PAUL.

[65 ARKANSAS, 553.]

EXECUTION SALES—REVERSAL OF JUDGMENT.—RESTITUTION.—Plaintiff purchasing at his execution sale is, on reversal of the judgment under which the sale was made, entitled to the benefit of the order of restitution, to enable him to restore the property in specie, if he can, and if he cannot he is responsible for its loss. If the property is purchased by a third person, the measure of damages is the price it brought at the sale and interest, and if the defendant is the purchaser, there can be no recovery against the plaintiff, except for money paid, because the defendant has what he claims.

J. S. Jordan and Rose, Hemingway & Rose, for the appellant.

G. B. Oliver and J. D. Block, for the appellee.

555 BUNN, C. J. The appellant, McCracken, obtained judgment against the defendants, and caused their property, consisting mostly of timber, lumber, and sawmill machinery, to be levied on and sold to satisfy his judgment. An appeal was prayed from the judgment, but no supersedeas bond was given, and no supersedeas writ issued. At an adjourned day of the term of the court, the defendants having filed a second motion for a new trial, on the ground of newly discovered testimony, among others, and after the execution sale, the court sustained the second motion, and set aside the former judgment, under which the sale of the property was had. Defendants then filed their amended answer and cross-complaint, claiming damages growing out of the sale of their said property under the judgment aforesaid; and the plaintiff first demurred, which being overruled, he answered, and a new trial was had, resulting in a verdict and judgment against the plaintiff for the full value of all the property sold. Plaintiff filed his motion for new 556 trial, showing that he had newly discovered evidence as to the sale of the property, tending to show who were the real purchasers, but this was overruled, and this appeal was taken. The record is too complicated and confused to justify a more extended statement of the case.

The trial court should have treated the amended answer and cross-complaint of defendants, as we now treat it, as a motion or petition for an order of restitution and prayer for damages in the alternative. That motion should have stated clearly and pointedly who was the real purchaser of the property sold at the execution sale, and how much of it each purchaser, if more than one, purchased at the sale, so that the plaintiff might have been permitted to restore the property to the defendants, or to the court, as the case might be, and, failing to do so, show cause why he did not or would not do so. The plaintiff, in pursuing his remedy to collect his debt, was neither a trespasser nor wrongdoer in the true sense, but had obtained a valid judgment fairly, and no supersedeas had been issued to stay his proceedings. He was therefore entitled to the protection of the rule, now of universal application in such cases, which is in substance thus laid down by Freeman in his work on Judgments, and which we give here for the future guidance of the court in the trial of this cause. Plaintiff purchasing at his

execution sale, on reversal of the judgment under which the sale is made, is entitled to the benefits of the order of restitution, so that he may restore the property in specie, if he can. If he cannot, he is responsible to the defendant for its loss. If the property is purchased by a third person, the measure of damages is the price it brought at the sale and interest, and if the defendant is the purchaser, there is no recovery against plaintiff, except for money paid, because the defendant has what he claims: Freeman on Judgments, secs. 482-484.

Reversed and remanded.

EXECUTION SALES—EFFECT OF REVERSAL OF JUDGMENT.—When property of a defendant has been sold, under a judgment afterward reversed, to a party to the judgment, the defendant may recover it back, or, if purchased by a third party, he may recover from the plaintiff the value thereof; but the title is unaffected by the reversal: Gould v. Sternberg, 128 Ill. 510; 15 Am. St. Rep. 138, and note. If the plaintiff is the purchaser, the defendant is entitled to a return of the identical property sold, in specie, though the same rule is not applied where the purchaser is a stranger to the judgment: See monographic note to Little v. Bunce, 28 Am. Dec. 369, 371, concerning the restitution of property upon the reversal of judgments.

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1. AN ACCOUNT STATED is prima facie, but not conclusive, evidence of the accuracy and correctness of the charges stated therein. (Hollenbeck v. Ristine, 306.)

2. ACCOUNT STATED.—The retention of an account, rendered without objection within a reasonable time, affords presumptive evidence of the correctness of such account, but it is for the jury to determine from all the evidence submitted to them whether there was such acquiescence by lapse of time as that there was an account stated, and, if there was, whether the items of the account were correct. (Hollenbeck v. Ristine, 306.)

ACTIONS.

See Carriers, 13; Fraud; Parent and Child, 1; Pleading, 14.

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ADVERSE POSSESSION.

1. POSSESSION, TO BE ADVERSE, must be under a claim of right, and there can be no adverse possession without an intention to claim title. (Hess v. Rudder, 182.)

2. ADVERSE POSSESSION—OPEN AND NOTORIOUS OCCUPANCY.—Occasionally cutting and carrying away rails and firewood from land chiefly valuable for timber is not such an open, notorious, and continuous occupancy as may create a title by adverse possession. (Wheeler v. Taylor, 540.)

3. ADVERSE POSSESSION—CONSTRUCTIVE POSSESSION—CUTTING WOOD.—Actual occupancy of a farm is not such constructive possession of a wood tract of land, distinct from and not connected with the farm, as may be made the foundation for an adverse possession of the wood tract, although the claimant procures wood and rails from the latter to use on the former. (Wheeler v. Taylor, 540.)

4. BOUNDARIES—ADVERSE POSSESSION.—If one of two adjacent landowners extends his fence so as to include within his inclosure lands belonging to his neighbor, in ignorance of the true boundary line between them and without intention of claiming

such extended area, but intending to claim adversely only to the true boundary line, such possession is not adverse, but if the fence, so extended, is believed to be the true line, and the claim of ownership is to the fence, such possession is adverse, although the established boundary is erroneous. (Taylor v. Fomby, 149.)

5. BOUNDARY LINES — PRACTICAL LOCATION OF AND ADVERSE POSSESSION UNDER.—If a survey is made for the purpose of locating a boundary between two tracts of land, the persons intending to purchase them being then present, and they subsequently purchase the lands and take and hold possession of their several tracts according to such survey, the possession of each must be deemed adverse to the other, though it is afterward discovered that the survey is incorrect. It must be presumed that each intended to claim title up to the line of the boundary as thus surveyed. (Hess v. Rudder, 182.)

6. ADVERSE POSSESSION OF COTERMINOUS OWNER.—If one occupies land up to a certain fence because he believes it to be the line of his land, but without an intention to claim up to the fence if it should be beyond his line, his possession is not adverse if his belief proves to be mistaken. (Hess v. Rudder, 182.)

7. ADVERSE POSSESSION — PRESUMPTION — ADVERSE USER.—The adverse claim of a right, and its exercise, uninterruptedly and without objection, for a period of ten years, raises a presumption that the right was lawfully acquired, and bars redress for its rightful exercise; but a right by adverse user does not accrue until there is an adverse user. (Shahan v. Alabama etc. R. R. Co., 20.)

8. ADVERSE POSSESSION—INSUFFICIENT PLEA OF ADVERSE USER.—In an action to recover damages against a railroad company for an injury resulting from an overflow of water from rainfall caused by embankments and culverts, which obstructed its natural flow, a plea which merely avers that the defendant constructed its embankments and culverts more than ten years prior to the injury, and has maintained them in the same condition ever since, without more, is insufficient as a plea of adverse user. (Shahan v. Alabama etc. R. R. Co., 20.)

9. ADVERSE POSSESSION—SUFFICIENT PLEA OF ADVERSE USER.—In an action to recover damages against a railroad company for an injury resulting from an overflow of water from rainfall caused by embankments and culverts, which obstructed the natural flow, a plea that, by reason of the embankments and culverts, the water had overflowed to the same extent, at intervals, during ten years prior to the injury, without complaint from the plaintiff, and that the results had been acquiesced in by the plaintiff, would be good. (Shahan v. Alabama etc. R. R. Co., 20.)

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See Attachment, 6.

AGENCY.

AGENCY—LIABILITY FOR PENAL OR CRIMINAL ACT OF AGENT.—A principal is liable for the acts of his agent done in the course of the performance of the principal's business, whether the agent is authorized or not, so long as such acts are civil in their nature; but he is not liable for criminal or penal acts of his agent unless done by his authority, assent, or approval. (Hall v. Norfolk etc. R. R. Co., 757.)

See Carriers, 6; Railroad Companies, 2, 3; Trial, 5.

ALIENS.

See Statutes, 2.

ALIMONY.

See Marriage and Divorce, 2.

AMENDMENT.

See Attachment, 7-11; Process, 4.

ANIMALS.

See Larceny.

APPEAL.

1. APPELLATE PRACTICE—JUDGMENTS.—The only question on appeal is whether the judgment of the lower court was correct or not, regardless of the reasons that may have been given for that judgment. (Estate of Grossman, 219.)

2. APPEAL, RIGHT OF, WHEN NOT WAIVED BY ACCEPTING BENEFIT UNDER A JUDGMENT.—If a party is entitled to a sum of money absolutely under a judgment, he is not, by accepting that money, precluded from prosecuting an appeal which does not involve the reversal of that part of the judgment or decree under which he takes the money. (Fielder v. Howard, 865.)

3. APPEAL—ESTOPPEL TO INSIST UPON WAIVER OF RIGHT OF.—If a respondent insists that an appellant file a bond on appeal, and obtains an order of court requiring it to be filed, which order is complied with, such respondent waives any objection that the right of appeal had, before the procuring of such order, been waived by the appellant by his accepting some benefit under the judgment appealed from. (Fielder v. Howard, 865.)

4. APPEAL—HARMLESS ERROR.—A judgment for the plaintiff will not be disturbed because of rulings restricting the cross-examination of a witness, where the defendant could not have been prejudiced by them. (Stephens v. Union Assurance Soc., 595.)

5. APPEAL—HARMLESS ERROR—REVERSAL OF JUDGMENT.—The erroneous admission of immaterial evidence is no ground for reversal, where the rights of the appellant were not prejudiced by the error. (Brown v. Markland, 629.)

6. APPEAL — ANSWER OF WITNESS — NONREVERSIBLE ERROR.—It is not reversible error for a court to receive, against an objection, the answer of a witness, which calls for a conclusion, though it may be improper, where the case is being tried before the court without a jury, where the facts on which the conclusion is based have all been stated in evidence, and where the evidence, regardless of such answer, is sufficient for the court to enter judgment in favor of the opposite party. (Maynard v. Locomotive Engineers' etc. Ins. Assn., 602.)

7. APPELLATE PRACTICE.—REVERSIBLE ERROR IS NOT COMMITTED in sustaining an objection to a competent question, when the same witness afterward answers substantially the same question. (Spencer v. McLean, 271.)

8. APPELLATE PRACTICE—IMPROPER TRANSFER OF LAW CASE TO EQUITY.—The transfer of a law case to equity over objection, whereby the objecting party is deprived of the right to have a question of law submitted to the jury, is prejudicial and reversible error. (Cole v. Mette, 945.)

9. APPELLATE PRACTICE.—Every unguarded expression by a court in stating reasons for a ruling in the presence of the jury cannot be treated as error requiring a reversal, and unless inadvertent remarks of the court operate to the injury of the appellant, they are not sufficient to reverse the judgment. (St. Louis etc. Ry. Co. v. Elgin etc. Milk Co., 238.)

10. APPELLATE PRACTICE.—IF INSTRUCTIONS ALREADY GIVEN correctly state the law, it is not error to refuse to give others or to refuse to modify those already given. (St. Louis etc. Ry. Co. v. Elgin etc. Milk Co., 238.)

11. INSTRUCTIONS—MISLEADING AND ARGUMENTATIVE—REVERSAL OF JUDGMENT.—If it is manifest that misleading or argumentative instructions probably unduly influenced the jury and thereby defeated a fair verdict, the judgment will be reversed and the cause remanded. Otherwise, the appellate court will not ordinarily reverse for such a cause. (Williams v. Hendricks, 32.)

12. PRACTICE—FINDINGS OF FACT—EFFECT OF FAILURE TO MAKE.—It is not error for a court to fail to make findings of fact on immaterial issues raised by his pleadings. (Maynard v. Locomotive Engineers' etc. Ins. Assn., 602.)

13. APPEAL.—THE FAILURE TO MAKE A FINDING on an issue is not reversible error if, under the facts and circumstances disclosed by the evidence, it would necessarily have been prejudicial to the appellant, and the facts found are sufficient to sustain the decree. (Hague v. Nephi Ins. Co., 634.)

14. APPEAL—FINDINGS OF FACT—EFFECT OF FAILURE TO MAKE.—A failure to make findings of fact on material issues raised by the pleadings is not reversible error where they, if found, must necessarily have been found adverse to the appellant, and when those already found were sufficient to support the judgment. (Maynard v. Locomotive Engineers' etc. Ins. Assn., 602.)

15. APPEAL—COMPETENCY OF EVIDENCE IN EQUITY CASES.—If there is ample proof in the record, unassailed, to justify the findings and decree, in an equity case, the appellate court will not determine the competency of evidence which could not have affected the decree. (Hague v. Nephi Irr. Co., 634.)

16. APPEAL—EQUITY CASES—REVIEW OF FINDINGS OF FACT.—An appeal may be taken, in equity cases, on questions of fact as well as of law, and the appellate court may go behind the findings, weigh all the evidence, and decide according to its preponderance; but the finding of the court below will not be disturbed when the evidence as to a fact is so evenly balanced, or the proof of it is so unsatisfactory, as to cause the mind to hesitate and pause as to the side on which it preponderates, and to leave it in grave doubt. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

17. INJUNCTION BONDS—APPELLATE PRACTICE.—The fact that the names of the sureties do not appear in the body of an injunction bond is not material on appeal, when the court approved the bond when the restraining order was issued. (Hyatt v. Washington, 248.)

18 APPEAL — PLEADING — GENERAL ISSUE — SPECIAL PLEAS—AFFIRMANCE OF JUDGMENT.—If a case is tried by the court alone, upon its merits, under the plea of the general issue, and without any reference to the special pleas of the defendant, the judgment must be referred to the general plea, and must be affirmed, if it is authorized by the facts under such plea, although there may have been error in overruling a demurrer to some of the special pleas. (Shahan v. Alabama etc. R. R. Co., 20.)

19. APPELLATE PRACTICE.—QUESTIONS OF FACT in actions at law are conclusively settled by the judgment of the appellate court affirming the judgment of the trial court. (St. Louis etc. Ry. Co. v. Elgin etc. Milk Co., 238.)

20. APPEAL BOND—IRREGULARITIES IN DO NOT MAKE VOID.—The fact that an undertaking on appeal was made payable to the clerk of the court instead of to the plaintiff in the judgment does not make it void. The sureties are, therefore, liable thereon. (Babcock v. Carter, 193.)

21. SUNDAY.—AN APPEAL BOND SIGNED ON Sunday, but delivered on a week-day to the clerk of the court, to whom it was made payable and by whom it was approved and accepted, created no liability until it was delivered, and therefore is not void as being executed on Sunday. (Babcock v. Carter, 193.)

See Costs; Judgment, 3; Justice of the Peace, 1.

APPLICATION OF PAYMENTS.

See Suretyship, 14.

AQUA AMMONIA.

See Definitions.

ARBITRATION AND AWARD.

1. ARBITRATION — REVOCATION OF AGREEMENT.—If an agreement to arbitrate partakes of the nature of a contract whereby important rights are gained and lost reciprocally, and the submission is the moving consideration to these acts, the agreement is irrevocable. (Zehner v. Lehigh Coal etc. Co., 586.)

2. ARBITRATION — REVOCATION OF AGREEMENT—CONSIDERATION.—If, by an agreement to arbitrate, the title to land, together with water privileges, is admitted to be in one of the parties, and damages are admitted to be due, and the agreement simply provides for their assessment, it is founded on a valuable consideration, and cannot be revoked by the other party. (Zehner v. Lehigh Coal etc. Co., 586.)

3. ARBITRATION—REVOCATION.—An agreement to arbitrate, when made a rule of court, is irrevocable. (Zehner v. Lehigh Coal etc. Co., 586.)

4. ARBITRATION — AGREEMENT CONCERNING PRACTICE.—An agreement to arbitrate made in an action then pending must be treated as under a rule of court, and it is not necessary to stipulate to that effect in the agreement. (Zehner v. Lehigh Coal etc. Co., 586.)

ARREST.

1. ARREST WITHOUT WARRANT OF A FUGITIVE FROM ANOTHER STATE.—If one charged with the commission of a felony in one state escapes to another, he may there be arrested without warrant and detained before a demand for his return has been made by the governor of the state whence he fled. (State v. Taylor, 648.)

2. WHEN AN ARREST IS MADE WITHOUT WARRANT of a person accused of the commission of a felony in another state, it is sufficient, in justification of the arresting officer, to show that he had reasonable cause to believe that the person arrested had committed a felony in the other state. (State v. Taylor, 648.)

3. ARREST—DUTY OF ARRESTING OFFICER TO DISCLOSE HIS AUTHORITY.—It is sufficient for the arresting officer to state to the person sought to be arrested that he arrests him by

authority of the state. It is not essential that the officer show his warrant or state the grounds of his arrest before making it, but, after it is made he should, if requested, state such grounds or show such warrant. (State v. Taylor, 648.)

4. ARREST — RESISTANCE BECAUSE PAPERS ARE NOT SHOWN AND A REVOLVER IS EXHIBITED.—Where an officer informs persons of his purpose to arrest them by authority of the state, and, on demand being made for his papers he exhibits a revolver, stating that is sufficient, and then returns it to his pocket, the case being one in which he is entitled to arrest without a warrant, the parties sought to be arrested are not justified in resisting, and if, in doing so, they kill one of the arresting party, there is nothing in these circumstances to reduce the killing to manslaughter. (State v. Taylor, 648.)

5. ARREST—EVIDENCE IN JUSTIFICATION OF.—When persons are on trial for an assault to commit murder made in resisting an arrest, it is proper to receive the testimony of witnesses to show information given the officer before the attempted arrest, and, further, that a felony had in fact been committed, and that the persons attempted to be arrested were fleeing from the scene of the crime soon after its commission. (State v. Taylor, 648.)

6. OFFICIAL CHARACTER—HOW MAY BE PROVED.—The testimony of a witness that he was constable of R., and was acting as such at the time of his attempting to make an arrest, is competent. It is not necessary to prove his official character by the record. (State v. Taylor, 648.)

ASSAULT.

1. ASSAULT AND BATTERY—EVIDENCE OF CHARACTER —CROSS-EXAMINATION.—If a man is charged with assault and battery upon a woman, and she, upon his trial, testifies that he came to her house during the absence of her husband, and said to her: "I want you to be mine and let me do what I want to with you," and that he approached her, put his arms around her, and started with her toward a bed, when she got loose from him, he is guilty as charged, if such testimony is true; and, if he introduces evidence of his good character, it is proper, on the examination of witnesses who testify to his good character, to bring out the fact that his general character for "running after women" is bad. (Balkum v. State, 19.)

2. ASSAULT WITH INTENT TO COMMIT MURDER—INSTRUCTIONS TO JURY ON A TRIAL FOR.—If persons are on trial accused of an assault to commit murder, such assault having been made in attempting to resist a lawful arrest, the jury should be instructed that, before they return a verdict of guilty, they should be convinced from the evidence of an actual intent on the part of the accused to take life. (State v. Taylor, 648.)

3. CRIMINAL LAW—ACTS OF ONE OF SEVERAL PERSONS ENGAGED IN RESISTING AN ARREST.—Where several persons are on trial for an assault to commit murder, all having been concerned in resisting an arrest, but one only of them doing the act which, had it resulted in the death of a human being, might have sustained a conviction for murder, the others cannot be convicted, if, on their part, they had no intent to resist the arrest to the extent of taking life. (State v. Taylor, 648.)

4. CRIMINAL LAW—EVIDENCE.—On the trial of persons accused of an assault to commit murder in resisting an arrest, it is proper to receive evidence tending to prove that one of them, near the close of the affray, ran off and hid, that he was afterward discovered and brought back, was found to be wounded, and when the

physicians who dressed his wounds inquired his name, age, and place of residence, he remained silent. (State v. Taylor, 648.)

ASSESSMENTS.

See Municipal Corporations, 15, 16; Taxation, 2.

ASSIGNMENT.

ASSIGNMENT—RIGHT OF ASSIGNEE TO ASSERT PRIORITY OF CLAIM.—The priority of claims held by the employés of a corporation over the lien of a mortgage upon the property of the corporation, may be asserted by an assignee of the claims. (Drennen v. Mercantile Trust etc. Co., 72.)

See Limitations of Actions, 7; Mechanics' Liens, 9; Mortgage, 7-9; Party-Walls, 3; Sales.

ATTACHMENT.

1. GARNISHMENT OF DEBT DUE TO TWO OR MORE JOINTLY cannot be affected under a writ against one of them only. (Willard v. Wing, 657.)

2. ATTACHMENT—VALIDITY OF LEVY.—To make a valid levy in attachment upon a stock of goods capable of manual delivery, it is necessary for the officer to take the goods into his custody and actual possession. (Meyer v. Missouri Glass Co., 927.)

3. ATTACHMENT — VALIDITY OF LEVY — PRIORITY.—A constable who, acting under a writ of attachment, and upon being denied the use of the key, by the owners of a locked storehouse, stations himself near such store at night, declares that he has made a levy upon the goods therein, and that he will break and enter the store the next morning, does not make a valid levy, and such levy is not good as against the levy of a sheriff, made the next morning, by taking the goods in the store into his custody and possession. (Meyer v. Missouri Glass Co., 927.)

4. ATTACHMENT—PERISHABLE PROPERTY—SALE OF.—Under a statute authorizing the court, on motion, to order the sale, in advance of judgment, of perishable property under attachment, the court has jurisdiction to order the sale of any property subject to attachment, and a sale made under such order vests a perfect title in the purchaser, as against the parties plaintiff and defendant, and all others not having a paramount title or lien. (McCreery v. Berney Nat. Bank, 105.)

5. ATTACHMENT—SALE OF PERISHABLE PROPERTY—COLLATERAL ATTACK.—If property subject to attachment is levied on, and motion is made by either party in a proper manner for an order of sale, on the ground that the property is perishable, the jurisdiction of the court to order the sale attaches, and whatever may be the character of the property, if the court is satisfied that, either by reason of its perishable nature, or because of the expense of keeping it until the termination of the litigation, it will prove, or be likely to prove, fruitless to the creditor, and that the purpose of its original seizure will probably be frustrated, its judgment in ordering the sale is conclusive, until reversed in some direct proceeding, and cannot be collaterally attacked. (McCreery v. Berney Nat. Bank, 105.)

6. ATTACHMENT.—SUPPLEMENTAL AFFIDAVIT in attachment need not expressly state that the additional facts therein stated came to the affiant's knowledge since the first affidavit. (Miller v. Zeigler, 777.)

7. ATTACHMENT — UNSIGNED WRIT — AMENDMENT.—A writ of attachment not signed by the clerk, is voidable only and not void, and admits of amendment. (Miller v. Zeigler, 777.)

8. ATTACHMENT—SIGNING WRIT—AMENDMENT.—A writ of attachment, not signed by the clerk when issued, but signed by him before a motion to quash, is good as against such motion. (Miller v. Zeigler, 777.)

9. PROCESS—AMENDMENT OF ATTACHMENT.—The inherent power of a court to amend its process is the same in attachment as in other suits. (Miller v. Zeigler, 777.)

10. PRACTICE—GARNISHMENT.—If an amended answer of a garnishee is not verified, its want of verification is waived by failing to object thereto. (Rock v. Collins, 885.)

11. GARNISHMENT — AMENDING ANSWER. — A garnishee who, in his original answer, denies all liability, may, at the close of the testimony at the trial, be permitted to amend his answer so as to admit possession of certain property under a chattel mortgage, and that he holds a conveyance of other property as security for a debt. (Rock v. Collins, 885.)

12. ATTACHMENT BOND—JOINDER OF PARTIES.—All the obligees in an attachment bond must be joined as plaintiffs in the capacity in which they are named for the use of such as claimed to have been injured. (Painter v. Munn, 170.)

13. PRACTICE—VARIANCE.—If a complaint by three persons styling themselves as late partners seeks to recover upon an attachment bond, which it describes as being payable to the plaintiffs, and such bond, upon being offered in evidence, appears to have been in favor of the partnership and also in favor of the three members as individuals, there is a fatal variance, and the jury should be instructed to find for the defendants. (Painter v. Munn, 170.)

14. ATTACHMENT.—THE FRAUDULENT DISPOSITION OF HIS INDIVIDUAL PROPERTY BY A PARTNER is not a fraudulent disposition of the property of the partnership, and does not of itself constitute a ground for suing out an attachment against the partnership by one of its creditors. In an action by the partnership for wrongfully suing out the attachment against it, it is no defense that one of the partners fraudulently disposed of his individual property. (Painter v. Munn, 170.)

15. ATTACHMENT, WRONGFULLY SUING OUT—MITIGATION OF DAMAGES.—In an action for wrongfully suing out an attachment, the defendant is entitled to plead, in mitigation of damages, that the plaintiff replevied the goods levied upon and afterward sold them and applied their proceeds to the payment of the debt due the defendant. (Painter v. Munn, 170.)

16. ATTACHMENT—INTERVENTION—ESTOPPEL.—One who, after a sale under attachment, but before payment of the proceeds, files an interplea claiming title to the property sold, or the proceeds thereof, is not estopped to prosecute his claim by independent suit because of the judgment in the original suit, to which he was not a party, discharging the attachment and giving defendant therein damages. (De Loach Mill etc. Co. v. Little Rock Mill etc. Co., 942.)

17. ATTACHMENT BOND—BREACH OF, WHAT IS.—If any ground exists for an attachment, it is not wrongfully sued out, and there is no breach of the attachment bond, though the ground stated in the affidavit for the attachment cannot be maintained. Therefore, in an action upon such a bond, the plaintiff must state in his complaint that no ground for the attachment existed. If exemplary damages are sought, the complaint must, in addition to showing

that the attachment was wrongfully sued out, negative the sworn ground upon which the attachment was issued and aver that it was sued out without probable cause to believe the sworn ground to be true. (Painter v. Munn, 170.)

See Equity, 1; Partnership, 9.

ATTORNEY AND CLIENT.

1. ATTORNEYS—DISBARMENT—WILLFUL MISCONDUCT. An attorney who affixes his official jurat as a notary public to affidavits which are not in fact sworn to before him, and files them in a case in which he is an attorney, is guilty of willful misconduct in his profession, for which he may be disbarred or suspended from practice, although the statements in such affidavits are true, and the case was decided on other grounds. (Ex Parte Finn, 550.)

2. ATTORNEYS—DISBARMENT.—An attorney at law cannot justify his willful misconduct in his profession, and evade disbarment or suspension from practice therefor, on the ground that such conduct was usual in the practice of the law. (Ex Parte Finn, 550.)

3. ATTORNEYS—DISBARMENT.—Proceedings for the disbarment of an attorney at law for misconduct in his profession are not entertained for the purpose of punishing the accused, but for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients. (Ex Parte Finn, 550.)

See Process, 1, 2.

BANKS AND BANKING.

1. BANKS AND BANKING—INDEBTEDNESS—TRANSFER OF STOCK—PRIORITY OF BANK'S LIEN.—The lien of a bank, on stock certificates issued by it, for an indebtedness due the bank by the owner of the stock, matured and unpaid, has priority over any lien of a third person, acquired by a bona fide transfer of the stock to him. (Oakland Co. Sav. Bank v. State Bank, 463.)

2. BANKS AND BANKING—INDEBTEDNESS—TRANSFER OF STOCK—ESTOPPEL TO ASSERT PRIORITY OF BANK'S LIEN.—Notwithstanding a statute which provides that no transfer of stock upon the books of a bank can be made except by consent of the directors, where the owner of the stock is indebted to the bank on matured paper, the bank is estopped from asserting a lien on stock, for such an indebtedness, where its cashier declares to the transferee, at the time of the transfer, that the bank has no lien on the stock, and the transferee takes it, relying upon such statement. (Oakland Co. Sav. Bank v. State Bank, 463.)

3. ESTOPPEL—DECLARATION OF BANK'S CASHIER.—A bank may speak through its cashier as its agent, and is estopped to deny the truthfulness of a statement made by him that the bank has no lien on certain stock, if the transferee of such stock is without knowledge of an indebtedness which the owner of the stock owes to the bank. (Oakland Co. Sav. Bank v. State Bank, 463.)

See Injunction, 4.

BICYCLES.

See Highways; 4.

BIGAMY.

1. BIGAMY—THE CONTINUANCE OF BIGAMOUS COHABITATION DOES NOT NECESSARILY INVOLVE CONTINUING

SEXUAL INTERCOURSE.—The man is guilty of this offense by living with the woman, apparently and confessedly as husband and wife, he having a wife living, though the woman with whom he so lived had become incapable of sexual intercourse, and for that reason it had been discontinued several years, this fact being, however, unknown to the public. (Cox v. State, 166.)

2. BIGAMY.—To bigamy sexual intercourse between the parties is essential; but the continuance of such intercourse is not indispensable to the continuance of bigamous cohabitation. (Cox v. State, 166.)

3. MARRIAGE, EVEN ON A PROSECUTION FOR BIGAMY, MAY BE PROVED BY CIRCUMSTANCES, and the jury may properly infer marriage from evidence tending to prove that the accused and the woman alleged to have been his wife before the second marriage lived under the same roof and had born to them children, that she and the children were known by his name, and they called him father, that she joined with him in the execution of a deed in which she was described as his wife, and that during the greater part of the time they were living together her mother lived with them. (Bynon v. State, 163.)

BILLS OF LADING.

1. CARRIERS—BILLS OF LADING—PRIOR CONTRACT NOT SUPERSEDED BY.—An antecedent oral contract between a shipper and carrier, entirely independent and distinct from the subsequent bill of lading, which seeks to limit the carrier's liability, is not superseded thereby. (St. Louis etc. Ry. Co. v. Elgin etc. Milk Co., 238.)

2. CARRIERS.—THE BILL OF LADING MUST BE TAKEN AS THE SOLE EVIDENCE of the final agreement of the parties, and, where it exists, parol evidence is inadmissible either to show a delivery of the goods or a contract for their carriage. (Tallassee Falls Mfg. Co. v. Western Ry., 179.)

BONA FIDE PURCHASERS.

See Corporations, 9, 10; Fixtures, 2; Judgment, 7; Mortgage, 2; Negotiable Instruments, 1, 14-16; Vendor and Purchaser, 5.

BONDS.

BONDS—LIABILITY CREATED BY.—If the stockholders in a corporation execute a bond to secure the directors thereof as sureties of the corporation and the bond is conditioned that any liability incurred shall be in proportion that the amount of stock held by each obligor bears to the whole amount of stock, the liability created is several and not joint. (Spencer v. McLean, 271.)

See Appeal, 17, 20, 21; Attachment, 12, 17; Execution, 25-27; Injunction, 11, 12; Suretyship, 5-10.

BOOKS OF ACCOUNT.

See Evidence, 5; Execution, 2.

BOUNDARIES.

1. BOUNDARIES—WHAT GOVERNS.—If different parts of the description of boundaries in a deed or patent conflict, those particulars which are most stable and certain, and least liable to be mistaken, are to prevail and a description of boundaries by known and visible natural and artificial monuments or landmarks is pre-

ferred to a description by courses and distances and other measurements. (Taylor v. Fomby, 149.)

2. BOUNDARIES.—IN CONSTRUING A DESCRIPTION of land, natural or artificial monuments control courses and distances. (Hess v. Rudder, 182.)

3. BOUNDARIES — HOW ASCERTAINED. — In determining boundaries, courses and distances are the next most certain items of description, after calls for monuments, natural or artificial, to which alone they yield, and in the absence of calls for monuments, or if those called for cannot be found, the courses and distances control quantity, and other less definite terms of description. (Taylor v. Fomby, 149.)

4. BOUNDARIES—WHAT CONTROLS.—In establishing an original line of survey according to the field notes used therein, attention is given, first to calls for natural or artificial monuments, and, if these are not to be found, to courses and distances, with the variation of the needle from the true meridian, as indicated for the original survey on the field notes. (Taylor v. Fomby, 149.)

5. BOUNDARIES—BY WHAT GOVERNED.—All disputes as to the boundary of land are governed by the United States survey, in the absence of statute to the contrary. The field notes and plats of the original surveyor are the primary and controlling evidence of boundary. The lines of sections and subdivisions thereof must be located by the original survey. (Taylor v. Fomby, 149.)

6. BOUNDARIES—HOW ESTABLISHED.—If, in fixing the boundary of land, the lines established by the original government survey are obvious, they must be followed though made on an assumed or wrong magnetic variation. It is only when lost lines and corners are to be renewed that due allowance must be made for the variation of the magnetic needle from the true meridian. (Taylor v. Fomby, 149.)

7. BOUNDARIES—BY WHAT CONTROLLED.—If, in establishing a disputed boundary, the line is to be run by certified copies of the field notes of the original government survey and by the calls for natural monuments indicated thereon, the magnetic variations of the needle from the true meridian have no bearing or influence on the question. (Taylor v. Fomby, 149.)

8. BOUNDARIES—QUESTION FOR JURY.—If, in a contest concerning the true boundary line between adjacent owners, the evidence, as well as two surveys thereof, is in conflict, the question should be submitted to the jury. (Taylor v. Fomby, 149.)

9. BOUNDARIES—HEARSAY EVIDENCE TO ESTABLISH.—Hearsay evidence, if material, is admissible to establish ancient boundaries. (Taylor v. Fomby, 149.)

See Adverse Possession, 4, 5.

BURDEN OF PROOF.

See Execution, 6; Insurance, 25, 30; Negotiable Instruments, 11; Vendor and Purchaser, 5.

CARRIERS.

1. CARRIERS—EXEMPTION FROM LIABILITY FOR NEGLIGENCE.—Special provisions in a contract made by a carrier cannot excuse or exempt him from liability for negligence. (Berry v. West Virginia etc. R. R. Co., 781.)

2. CARRIERS—RIGHT TO LIMIT LIABILITY.—Contracts of carriers, based upon a valuable consideration, limiting their com-

mon-law liability, are valid, but cannot exempt from liability for negligence. (Berry v. West Virginia etc. R. R. Co., 781.)

3. CARRIERS—LIABILITY AS SUCH, WHEN ENDS.—A carrier continues liable as such for a reasonable time after the goods have arrived and have been put in the warehouse. After such time the liability is only as a warehouseman. (Berry v. West Virginia etc. R. R. Co., 781.)

4. CARRIERS—LIABILITY ASSUMED BEYOND TERMINUS. A common carrier may contract to carry and deliver goods at a place beyond the terminus of its own route, and it thereby becomes liable as a carrier for the whole distance. The connecting carriers then become its agents, for whose negligence or default it is responsible. (St. Louis etc. Ry. Co. v. Elgin etc. Milk Co., 238.)

5. CARRIERS—DUTY TO GIVE NOTICE OF ARRIVAL OF GOODS.—A carrier is not required, in the absence of usage, to give the consignee notice of the arrival of his goods, and the latter is only entitled to a reasonable time after such arrival to remove them. During such time the carrier is liable as carrier, and after that only as a warehouseman. (Berry v. West Virginia etc. R. R. Co., 781.)

6. CARRIERS—NOTICE OF ARRIVAL OF GOODS—AGENCY. Notice of the arrival of goods given to a drayman merely authorized to haul such goods from the depot to the store of the consignee is not notice to the latter. (Berry v. West Virginia etc. R. R. Co., 781.)

7. CARRIER—NOTICE OF ARRIVAL OF GOODS.—MISINFORMATION given by a carrier or its agents to the consignee as to the arrival of goods, and which prevents their removal, binds the carrier, and makes him liable for the value of the goods if they are thereafter lost or destroyed. (Berry v. West Virginia etc. R. R. Co., 781.)

8. CARRIERS—DUTY OF CONSIGNEE TO REMOVE GOODS. The consignee must keep a lookout for the arrival of his goods by adopting such means as may be expected to inform him of their arrival, and to hold the carrier liable as such, after their arrival, he must promptly and diligently remove them within a reasonable time, regardless of his distance from the depot or his means for removal. (Berry v. West Virginia etc. R. R. Co., 781.)

9. CARRIERS.—WHAT IS REASONABLE TIME FOR REMOVAL OF GOODS by the consignee from a railroad warehouse after their arrival is a question of fact, under all the circumstances, for the jury to decide, unless such facts are accurate and undisputed, and then it is a question of law for the court. (Berry v. West Virginia etc. R. R. Co., 781.)

10. CARRIERS—LIABILITY FOR GOODS SEIZED UNDER LEGAL PROCESS.—A common carrier is excused from liability for not carrying and delivering goods, seized while in his hands by virtue of legal process, and taken out of his possession without any act, fault, or connivance on his part. (Indiana etc. Ry. Co. v. Doremeyer, 264.)

11. CARRIERS—BAGGAGE.—SAMPLES OF MERCHANDISE carried for the purpose of making sales of goods are not "baggage," within the meaning of a statute making it a misdemeanor for a railroad company to charge more than a fixed price for transporting excess baggage above a certain amount in weight. (Kansas City etc. R. R. Co. v. State, 933.)

12. CARRIERS—PROOF OF CONTRACT WITH.—Oral evidence of a contract cannot be substituted for written when it has been put in writing. (Tallassee Falls Mfg. Co. v. Western Ry., 179.)

13. CARRIERS, ACTION AGAINST, WHEN EX CONTRACTU.—If a complaint against carriers alleges both a consideration and a promise, the action is not ex delicto, but ex contractu. (Tallassee Falls Mfg. Co. v. Western Ry., 179.)

14. CARRIERS, ACTION AGAINST, WHAT NECESSARY TO SUPPORT.—One suing a common carrier to recover for a loss must show delivery of the goods to the carrier, an undertaking on his part, express or implied, to transfer them, and a failure to perform his contract or duty. If the contract is express, it must be proved, whether the action is in tort or in assumpsit. (Tallassee Falls Mfg. Co. v. Western Ry., 179.)

CHATTEL MORTGAGE.

CHATTEL MORTGAGE—MISDESCRIPTION OF DEBT.—If a debt, to secure which a chattel mortgage is given, is incorrectly described as to amount, but correctly as to date, the mortgage is not on that account invalid. (Rock v. Collins, 885.)

See Execution, 19; Partnership, 4, 5.

COLLATERAL ATTACK.

See Attachment, 5; Corporations, 1.

CONSPIRACY.

CONSPIRACY—OBSTRUCTING PUBLIC OFFICER.—A combination of two or more persons to obstruct an executive officer in the exercise of his lawful right to examine, in his official capacity, the books of a city officer for a proper purpose, is indictable as a conspiracy. (Tryon v. Pingree, 398.)

See Municipal Corporations, 22.

CONSTITUTIONS.

1. CONSTITUTIONAL LAW.—CONTRACTS, within the meaning of the provision of the federal constitution prohibiting state legislation impairing the obligations of contracts, are voluntary agreements of minds upon a sufficient consideration to do or not to do certain things. (Ladd v. Portland, 526.)

2. CONSTITUTIONAL LAW.—CONTRACTS BY A STATE GRANTING IMMUNITY from taxation to individuals, or corporations, are within the provision of the federal constitution inhibiting the passage of laws by the state impairing the obligation of contracts. (Ladd v. Portland, 526.)

See Statutes.

CONTRACTS.

1. CONTRACTS—CONSIDERATION.—A promise made to a person to induce him to perform an act which he is already bound in law to perform is without consideration and is not binding. (Spencer v. McLean, 271.)

2. CONTRACT NOT TO ENGAGE IN BUSINESS, CONSTRUCTION OF.—A contract that R. will not engage in a specified business so long as B. continues therein terminates when B. forms a corporation and transfers the business to it. Thereafter he is not conducting the business, and hence R. may enter into a like business on his own account. (Bagby & Rivers Co. v. Rivers, 357.)

3. CONTRACTS VOID FOR AMBIGUITY.—A contract reciting that one party has bought of another party "all the colored nails for the year 1887, at forty cents, to be delivered monthly," which one

of the parties contends was a purchase of the output of his mill for that year, while the other contends that it was a purchase of such nails as he required in the course of his business during such year, is void for ambiguity, and by itself and without competent evidence to make it certain cannot be made the basis of an action. (Hall v. Chambersburg Woolen Co., 563.)

4. EVIDENCE—DEATH OF AGENT.—In an action upon an ambiguous contract, evidence as to the way in which it was understood by a member of a firm with whom it was made, and who has since died, is inadmissible. (Hall v. Chambersburg Woolen Co., 563.)

5. CONTRACTS—RIGHT OF ACTION, WHEN MADE FOR A THIRD PERSON'S BENEFIT.—If a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon, at the instance and in the name of the party to be benefited, although the promise or contract was made without his knowledge, and without any consideration moving from him. This principle applies to the sale of a mine, where the purchaser assumes, and agrees to pay, the claim of a third person against it. (Brown v. Markland, 629.)

6. PLEADING — PERFORMANCE OF CONDITION EVIDENCE OF WAIVER.—If a pleading contains an allegation of the performance of a condition, it is not absolutely necessary to allege a waiver, because proof thereof is admissible under the general allegations. (Stephens v. Union Assurance Soc., 595.)

See Bills of Lading, 1; Carriers, 12; Constitutions, 1, 2; Evidence, 7, 8; Waterworks and Water Companies, 9, 10.

CONTRIBUTION.

See Suretyship, 13, 15.

CORPORATIONS.

1. CORPORATIONS—COLLATERAL ATTACK UPON.—The right of a corporation to act as such cannot be attacked in a collateral suit or proceeding by proving that certain subscriptions to its capital stock had not been paid in cash but in securities. (Roane Iron Co. v. Wisconsin Trust Co., 856.)

2. EVIDENCE—INSPECTION OF BOOKS OF CORPORATION.—The books, papers, and accounts of a corporation in the hands of a receiver may be inspected by persons interested as stockholders or depositors, to secure evidence to aid in the prosecution of an officer of the corporation indicted for embezzlement of its funds. (McElree v. Darlington, 592.)

3. EVIDENCE—SUPPRESSION OF CORPORATION BOOKS TO CONCEAL CRIME.—An officer or employé of a corporation who is under indictment for embezzlement of its funds cannot require of it a suppression or concealment of his own entries in its books, although the entries may furnish the material clue to his crime, and possibly afford satisfactory evidence of it. (McElree v. Darlington, 592.)

4. CORPORATION, JUDGMENT AGAINST IN ANOTHER STATE, EFFECT OF ON NONRESIDENT STOCKHOLDER.—A decree or judgment against a corporation making an assessment on its capital stock is binding on all its stockholders, whether or not they are residents of the state or parties to the suit, to the extent of determining the necessity for, and the amount of, the assessment. (Castleman v. Templeman, 363.)

5. CORPORATIONS, FOREIGN, JURISDICTION OVER.—So long as a corporation confines its operation to the state in which it was created, it cannot be sued in another state in which it has no office and transacts no business, by serving process on its president or other officer temporarily within that state. (Crook v. Girard Iron etc. Co., 325.)

6. CORPORATIONS—JURISDICTION.—A FOREIGN corporation which has done no business within a state, except to purchase some machinery at a sheriff's sale, has not engaged in business therein, so as to authorize the service of process to be made upon one of its officers temporarily within the state. (Crook v. Girard Iron etc. Co., 325.)

7. CORPORATIONS, FOREIGN—DOING BUSINESS IN ANOTHER STATE THROUGH AGENT.—A corporation of one state may send its agents to another state to solicit orders for its goods or contract for the sale thereof, without being embarrassed or obstructed by state requirements as to taking out licenses, filing certificates, establishing resident agencies, or like conditions. (Mearshon v. Pottsville Lumber Co., 560.)

8. CORPORATIONS, FOREIGN—DOING BUSINESS IN ANOTHER STATE THROUGH AGENT.—A foreign corporation having all of its capital invested in the state of its origin may execute orders taken by its agents for the delivery of goods in another state, without complying with a statute of that state requiring a foreign corporation doing business within the state to appoint a resident agent therein. (Mearshon v. Pottsville Lumber Co., 560.)

9. CORPORATIONS—SALE OF PROPERTY—RIGHTS OF BONA FIDE PURCHASERS OF BONDS RECEIVED IN PAYMENT, AFTER ANNULMENT OF CONVEYANCE AS FRAUDULENT.—If a corporation transfers all of its property, by deed, to another corporation, taking in payment bonds payable to the holder, and, without providing for its debts, divides the bonds among its stockholders, a bona fide purchaser of such bonds is entitled to protection, as such, against a creditor of the grantor, who causes the conveyance to be set aside as fraudulent, and is entitled to a foreclosure of a deed of trust to the property conveyed, given by the grantee to secure such bonds, unaffected, so far as his rights are concerned, by the decree annulling the conveyance and a sale thereunder. (Lebeck v. Fort Payne Bank, 51.)

10. CORPORATIONS—SALE OF PROPERTY—BONA FIDE PURCHASER OF BONDS RECEIVED IN PAYMENT—WHEN.—If a corporation transfers all of its property by deed to another corporation, taking in payment negotiable bonds secured by a trust deed to the property conveyed, and, without providing for its debts, divides the bonds among its stockholders, a person who buys some of the bonds from one of the stockholders, without knowledge that he is a stockholder, or of any facts pertaining to the transactions, except what is disclosed by the bonds, and muniments, which show a clear title to the property conveyed by the trust deed, is a bona fide purchaser. (Lebeck v. Fort Payne Bank, 51.)

11. CORPORATIONS—PREFERENCES.—An insolvent corporation can prefer its bona fide creditors the same as any individual, but it cannot prefer a creditor who is also a director. (Rockford etc. Grocery Co. v. Standard Grocery etc. Co., 205.)

12. CORPORATIONS — INSOLVENCY — PREFERENCE TO GUARANTEED CREDITOR.—The directors of an insolvent corporation have power to authorize a judgment note to be given by the corporation to take up a note guaranteed by its directors and given for money borrowed and used for corporation purposes during

its solvency. Fraud cannot be predicated on such transaction, although the holder of the note is thereby given a preference over other corporate creditors. (Rockford etc. Grocery Co. v. Standard Grocery etc. Co., 205.)

13. CORPORATIONS, CREDITORS, RIGHT OF TO SUE FOR SUBSCRIPTIONS.—Where a creditor of a corporation has obtained a decree against it that assessments be made against specified stockholders and that they pay the amounts thereof to a receiver named, such creditor cannot maintain an action upon such assessment, though the decree further declares he is entitled to all moneys to be collected thereon, because, by the terms of the decree, a right of action is vested exclusively in the receiver, or in the name of the corporation for his use. (Castleman v. Templeman, 363.)

See Bonds; Injunction, 5; Interstate Commerce; Receivers, 1; Suretyship, 16; Taxation, 4; Wages.

COSTS.

COSTS OF APPEAL.—Where an appellant prints several briefs and an unnecessarily voluminous transcript, his costs will ordinarily be restricted to the printing of one brief and to so much only of the transcript as is necessary for the proper presentation of his case. (Cook v. Minneapolis etc. Ry. Co., 830.)

COTENANCY.

1. COTENANCY.—If the owner of a farm leases it, with certain cows and other personal property thereon, under an agreement that, after paying expenses and taxes, each should be entitled to one-half of the income and profits, the lessor and lessee are tenants in common of milk produced from such cows. (Willard v. Wing, 657.)

2. COTENANCY—EVIDENCE OF OUSTER.—The evidence necessary to prove ouster by one cotenant against another is much greater than in cases in which such relation does not exist between the parties. (Wheeler v. Taylor, 540.)

3. COTENANCY—POSSESSION — PRESUMPTION.—The possession of one cotenant of the common property is presumed to be the possession of all, and each cotenant has a right to rely upon such presumption, until the acts or declaration of the tenant in possession are palpably inconsistent with it. (Wheeler v. Taylor, 540.)

4. COTENANCY — ADVERSE POSSESSION. — Possession of land by the mother of the former deceased owner is adverse to the other heirs, when she claims the property absolutely, and all of the interested parties suppose that she is the sole heir of the deceased. (Wheeler v. Taylor, 540.)

5. COTENANCY—ADVERSE POSSESSION—NOTICE.—If one cotenant is distinctly notified that the cotenant in possession claims to own the common property absolutely, his adverse possession begins to run from such notice. (Wheeler v. Taylor, 540.)

6. COTENANCY—ADVERSE POSSESSION—NOTICE.—If a cotenant distinctly states that he has nothing to do with the property in dispute, and that the sole title is in the tenant in possession, he has sufficient notice of the claim of ownership of the tenant in possession to make it adverse. (Wheeler v. Taylor, 540.)

7. COTENANCY—ADVERSE POSSESSION—NOTICE.—Entry upon real property by a person claiming to be a tenant in common can never become the foundation for an adverse possession, as against his cotenants, until they have notice of his repudiation of their rights. (Wheeler v. Taylor, 540.)

8. COTENANCY—ADVERSE POSSESSION—TACKING POSSESSIONS.—The title acquired by one of the cotenants of real property under a deed in severalty from a cotenant who has taken possession, under the belief of all of the cotenants that he is the absolute owner of the entire title, does not inure to the benefit of another cotenant, and the grantees may tack their possession to that of their grantor for the purpose of establishing a title by adverse possession, as against such other cotenant. (Wheeler v. Taylor, 540.)

See Prohibition, 1.

CRIMINAL LAW.

1. CRIMINAL LAW—ALLEGATION OF PLACE.—An allegation in a complaint that the offense charged was committed "at a house on the corner" of two specified streets within a certain city is a sufficient allegation as to place of the offense. (Grand Rapids v. Williams, 396.)

2. DISORDERLY CONDUCT—WHAT IS.—A stranger who has no business there and is peeking into the windows of an occupied, lighted residence, at hours of the night when people usually retire, is guilty of indecent and insulting conduct, and violates an ordinance providing a punishment for disorderly, indecent, or insulting conduct or disorderly persons. (Grand Rapids v. Williams, 396.)

3. DISORDERLY CONDUCT—INTENT.—An improper or unlawful purpose is not a necessary element in the offense of indecent, insulting, or immoral conduct, in violation of an ordinance providing a punishment for such conduct. (Grand Rapids v. Williams, 396.)

4. CRIMINAL LAW—SALE OF ADULTERATED FOOD—GUILTY KNOWLEDGE OR INTENT.—If a statute prohibits the sale of an adulterated article of food, such as mustard, and defines adulteration, proof of guilty knowledge or intent is not essential, in a prosecution thereunder, to the conviction of one who sells such article. (People v. Snowberger, 449.)

5. PENALTY—DEFINITION.—A penalty is in the nature of a punishment for the nonperformance of an act, or for the performance of an unlawful act; and involves the idea of punishment, whether enforced by a civil or criminal proceeding or action. (Hall v. Norfolk etc. R. R. Co., 757.)

6. CRIMINAL LAW—STATUTORY PENALTY—LIABILITY FOR.—A person is not answerable for a statutory penalty for doing an act forbidden by statute unless he knowingly and willfully commits the wrong, or willfully and knowingly causes another to do it by his command or authority. (Williams v. Hendricks, 32.)

DAMAGES.

1. DAMAGES.—FOR A VOLUNTARY WRONGFUL act the doer is answerable for any injury that may happen by reason thereof, whether by accident or carelessness. (Isham v. Dow, 691.)

2. WANTON ACTS—LIABILITY FOR.—If an injurious act is wanton, the doer of it is liable for all consequences, however remote, because the act is quasi criminal in character, and the law conclusively presumes that all consequences were foreseen and intended. (Isham v. Dow, 691.)

3. DAMAGES FOR INTERFERING WITH ANOTHER'S PROPERTY OR TENANTS.—One who prosecutes a proceeding purporting to affect the title to real property, knowing that his title

is invalid and based upon fraud, and who interferes with the tenants of the owner by serving notices on them not to pay rent, thereby causing them to abandon the property and the owner to lose his rents, is liable to an action brought by the latter to recover damages thus suffered. (Gore v. Condon, 352.)

4. EXPLOSIVES—LIABILITY FOR.—KEEPING GUNPOWDER stored in a city in violation of a statute imposes a liability in favor of a person damaged in consequence of such violation, if the latter was one for whose protection the statute was intended. (Kinney v. Koopman, 119.)

See Attachment, 15; Equity, 15; Railroad Companies, 3, 5.

DEBTOR AND CREDITOR.

See Corporations, 11, 12.

DEEDS.

1. PRESUMPTION AS TO THE DATE OF THE EXECUTION OF A DEED.—A deed is presumed to have been executed on the day it bears date, although acknowledged at a later day, as appears by the certificate of such acknowledgment. (McFarlane v. Louden, 883.)

2. DEEDS.—DELIVERY of a deed depends on the intent of the parties, and if, without formal words of delivery, the intent may be shown by circumstances. Acknowledgment with direction to record the deed is strong evidence of delivery. (Delaplain v. Grubb, 788.)

3. THE DELIVERY OF A DEED is a question of intention. The handing of it to the grantee, to be taken to his lawyer for examination, with the understanding that the parties will meet subsequently and complete their bargain, is not a delivery. There can be no delivery of a conveyance until the grantor parts with it with the intent to pass the title. (Curry v. Colburn, 860.)

4. DEEDS—DELIVERY.—If the parties to a deed meet to make it and read, sign, and acknowledge it, without reservation and with intent that it shall then become effective, this amounts to delivery. (Delaplain v. Grubb, 788.)

5. DEED—PAROL EVIDENCE TO PROVE THAT, THOUGH GIVEN TO THE GRANTEE, IT WAS NOT DELIVERED.—It is always competent to show by parol evidence that a deed, although put in the grantee's hands by the grantor, was not delivered with intent to pass the title, unless the grantor, or those claiming under him, are in some way estopped from denying delivery. (Curry v. Colburn, 860.)

6. DEEDS—REGISTRATION AS NOTICE.—The record of a deed is notice only to those who are bound to search for it, including parties subsequently dealing with the land or concerned with its title, but antecedent rights are not generally affected by registration and the record is not notice to the grantor in the deed. (Davis v. Monroe, 581.)

7. DEEDS—PRESUMPTION AS TO GRANTOR'S COMPETENCY.—It is presumed that the grantor in a deed was sane and competent at the time he executed it. (Delaplain v. Grubb, 788.)

8. DEEDS—GRANTOR'S CAPACITY—OLD AGE.—Although a grantor in a deed is extremely aged, his mind weak and impaired, compared with what it has been, his demeanor on occasions eccentric, and even if he has no capacity to transact general business, yet, if he understands the nature of what he is doing, and recollects

the property he is disposing of, and the person to whom he is giving it, and how he desires to dispose of it, at the time that he executes the deed, this is sufficient to make it valid. (Delaplain v. Grubb, 788.)

9. DEEDS.—OLD AGE ALONE does not affect the competency of the grantor in a deed. (Delaplain v. Grubb, 788.)

10. DEEDS—GRANTOR'S CAPACITY—EVIDENCE.—The time of the execution of a deed is the material or critical point to be considered upon the inquiry as to the grantor's capacity, and the evidence of the officer taking the acknowledgment, and of disinterested persons present at that time, is entitled to peculiar consideration on the question of capacity. (Delaplain v. Grubb, 788.)

11. DEEDS—UNDUE INFLUENCE.—A grant of property, induced by gratitude for kindness, affection, and esteem, is not the result of undue influence. (Delaplain v. Grubb, 788.)

12. DEEDS.—UNDUE INFLUENCE to avoid a deed must be such as to destroy free agency, and substitute the will of another for that of the person nominally acting. (Delaplain v. Grubb, 788.)

13. DEEDS—UNDUE INFLUENCE.—To set aside a deed for undue influence it must be shown that the grantor had no free will, but stood in vinculis at the time he executed it. (Delaplain v. Grubb, 788.)

14. DEEDS—UNDUE INFLUENCE.—Suggestion and advice addressed to the judgment never constitute undue influence in the execution of a deed, and neither does solicitation, unless the grantor is worn out with importunities, so that his will gives way. Even earnest entreaty, importunity, and persuasion may be employed, as well as appeals to remember past kindness, or to relieve distress, without constituting it undue influence. (Delaplain v. Grubb, 788.)

See Fraudulent Conveyances; Mortgages, 1-3; Partnership, 6; Party Walls, 1, 2.

DEFINITIONS.

DEFINITIONS—POISON.—Aqua ammonia is a poison. (Early v. Standard Life etc. Ins. Co., 445.)

"Change of interest." (Peck v. Girard F. & M. Ins. Co., 600.)

"Contract." (Ladd v. Portland, 526.)

Marketable title. (Barnard v. Brown, 432.)

"Matrimonial cohabitation." (Cox v. State, 166.)

"New building." (Warren v. Freeman, 583.)

Penal statute. (Hall v. Norfolk etc. R. R. Co., 757.)

Penalty. (Hall v. Norfolk etc. R. R. Co., 757.)

Public and private nuisance. (Kinney v. Koopman, 119.)

"Total loss." (Santa Clara etc. Academy v. Northwestern Nat. Ins. Co., 805.)

Undue influence. (Delaplain v. Grubb, 788.)

DEPOSITIONS.

1. EVIDENCE—DEPOSITIONS.—A deposition taken in shorthand must be fully written out in longhand, read by or to the witness and signed by him, before it can be received as evidence. (Zehner v. Lehigh Coal etc. Co., 586.)

2. EVIDENCE — DEPOSITIONS. — OBJECTIONS TO IMPROPER QUESTIONS in a deposition cannot be made for the first time when the deposition including such questions and answers is read to the jury. (Alabama Nat. Bank v. Rivers, 95.)

DISBARMENT.
See Attorney and Client.

DISORDERLY CONDUCT.
See Criminal Law, 2, 3; Evidence, 10.

DOGS.
See Larceny.

EASEMENT.

EASEMENT—TITLE BY PRESCRIPTION—WHAT IS REQUIRED.—The adverse use of an easement will give title by prescription, if accompanied by the same facts as to length of time, exclusiveness, and acquiescence which are necessary to give title to real estate, by adverse possession, under the statute of limitations. It is otherwise if such facts do not exist; and the facts relied upon to give title to an easement by prescription can only be applied as to time when analogous in other respects. (North Point etc. Ins. Co. v. Utah etc. Canal Co., 607.)

EJECTMENT.

1. EJECTMENT—PROJECTING EAVES.—One who occupies his premises up to his boundary line cannot maintain ejectment against the proprietor of the adjoining premises who has constructed a building up to such line having eaves which project several inches beyond it and over the line of the plaintiff's property and thereby cast water upon the roof of his building. (Rasch v. Noth, 858.)

2. EJECTMENT AGAINST THE GOVERNMENT, STATE OR NATIONAL—DEFENSE.—When one in the actual possession of property defends his right of possession, in an action of ejectment, upon the ground that the government, state or national, has placed him in possession, he must show that the right of the government is paramount to the right of the plaintiff, or judgment will go against him. (Scranton v. Wheeler, 484.)

3. EJECTMENT—OCCUPANCY—COMPENSATION FOR IMPROVEMENTS—EVIDENCE.—Under a statute allowing compensation for improvements, made by defendants in ejectment, who shall have "occupied" the premises for a less time than six years, under a color of title and in good faith, a defendant in ejectment who, before the commencement of the action, entered upon the premises in good faith, under color of title, painted the exterior of the house, shingled a portion of the roof, and moved some things into the house, is entitled to recover for such improvements, and it is error to exclude such evidence of occupancy, for the occupancy required by such a statute does not imply that the claimant shall have actually lived and made his home upon the disputed property. (Jones v. Merrill, 475.)

4. EJECTMENT—ESTOPPEL—BOUNDARIES.—The rule that owners of adjoining tracts of land, by parol agreement, or recognition from which an agreement may be inferred, may settle and establish permanently the boundary line between their lands, which, if followed by possession according to such lines, is binding upon them and their grantees and estops them to claim title beyond such line, does not apply in an action of ejectment where it is sought to prevent one from asserting title to land established by him through a chain of title, on the ground that the acts of the parties to such chain of title establish an intention to transfer and convey

another tract than that described in their deeds. (Linnertz v. Dorway, 232.)

5. EJECTMENT.—ESTOPPEL IN PAIS cannot be invoked in an action in ejectment in order to defeat the legal title to a permanent interest in lands. In such action the legal title must prevail. (Linnertz v. Dorway, 232.)

6. EJECTMENT—ESTOPPEL IN PAIS—QUESTION FOR JURY.—If the plaintiff in ejectment shows title in himself by mesne conveyances from the defendant, and also shows possession in the latter, the case should be submitted to the jury, and the court commits error in directing a verdict for the defendant under evidence relied upon to establish an estoppel in pais against the plaintiff. (Linnertz v. Dorway, 232.)

7. EJECTMENT — OCCUPANCY — QUESTION OF GOOD FAITH IS FOR JURY.—If the circumstances, in an action of ejectment, throw doubt upon the defendant's good faith in occupying the property, this is a question for the jury. (Jones v. Merrill, 475.)

8. ESTOPPEL IN PAIS—EJECTMENT.—The acceptance by a grantee of a tract of land less than that described in his deed does not, in the absence of agreement, estop his grantee, in an action of ejectment, from asserting title to the land not so included in the deed, as against the original grantor. (Linnertz v. Dorway, 232.)

ELECTIONS.

See Municipal Corporations, 8.

ELEVATORS.

See Master and Servant, 2, 3, 5, 7; Real Property.

EMBEZZLEMENT.

See Corporations, 2, 3.

EMINENT DOMAIN.

TAKING PROPERTY FOR A PUBLIC USE—WHAT IS NOT.—The destruction of property to avert an imminent public injury is not a taking for a public use, and is, in no legal sense, an exercise of the right of eminent domain. The former is an exercise of the police power, and the latter stands on constitutional grounds. The taking of property for a public use can await the forms and delays of the law, but the destruction of property to prevent imminent public injury is governed by necessity, which knows no law. (Aitken v. Wells, 672.)

EQUITY.

1. ATTACHMENT—EQUITY.—If an attachment in a suit in equity for a debt before maturity is bad, and fails, the suit must fall with it, and should be dismissed. (Miller v. Zeigler, 777.)

2. EQUITY—JURISDICTION—RECOVERY OF LAND.—Courts of equity have no jurisdiction of suits brought merely to recover the possession of land and to establish one legal title against another conflicting legal title, even though a question concerning the priority of liens is involved. (Cole v. Mette, 945.)

3. EQUITY—CONTROL OF DEBTOR'S PROPERTY—JURISDICTION.—Insolvency alone, in the absence of fraud or collusion, does not authorize a court of equity to take charge of a debtor's property at the suit of his creditor, and to administer it for the benefit of creditors. (McCreery v. Berney Nat. Bank, 105.)

4. RECEIVERS—SEQUESTRATION — JURISDICTION — SUBJECT MATTER—PARTIES.—The sequestration of property, the subject matter of a suit in equity, that it may be preserved in its integrity, pending the making of future orders in reference to it, or pending the suit, is within the inherent jurisdiction of the court. The sequestration is in rem, drawing the property into the custody and control of the court, and binds the property, though there may not be jurisdiction of all the persons having rights or interests in it. (Steele v. Walker, 62.)

5. INJUNCTION—DAMAGES INSTEAD OF.—Whenever a court of equity has jurisdiction to entertain a bill for an injunction against the commission or continuance of a wrongful act, it may award damages in substitution for such injunction, when the defendant, by his acts committed subsequent to the service of process upon him, has rendered relief by injunction ineffectual. (Hazen v. Lyndonville Nat. Bank, 680.)

See Appeal, 15, 16; Injunction, 13; Intervention, 1, 2; Pleading.

ESTOPPEL.

See Appeal, 2, 3; Attachment, 16; Banks and Banking, 2, 3; Ejectment, 4, 5, 6, 8; Partnership, 9; Vendor and Purchaser, 6.

EVIDENCE.

1. EVIDENCE—JUDICIAL NOTICE.—The court does not know judicially that a powder magazine may not be so constructed and provided as to insure absolute safety from lightning. (Kinney v. Koopman, 119.)

2. INTENT—PRESUMPTION OF.—When an intelligent person does an act, the law presumes that in so doing he intends that the natural and legal consequences of his acts shall result. (Hazen v. Lyndonville Nat. Bank, 680.)

3. EVIDENCE.—SECONDARY EVIDENCE of the contents of a written private contract is not admissible until a sufficient excuse is shown for a failure to produce the contract itself. (Phoenix Assurance Co. v. McAuthor, 154.)

4. EVIDENCE—SECONDARY—CONTENTS OF WRITING.—If a person is shown to have had the possession of a written contract, secondary evidence of its contents is admissible only after it is shown that he has made a bona fide and diligent, but unsuccessful, search for it in the place where it was most likely to be found. (Phoenix Assurance Co. v. McAuthor, 154.)

5. EVIDENCE—BOOKS OF ACCOUNT.—Under a special contract to deliver goods periodically in future, the seller cannot prove the deliveries by his books of original entry. Such delivery must be proved by independent evidence. (Hall v. Chambersburg Woolen Co., 563.)

6. EVIDENCE.—MEDICAL BOOKS ARE NOT ADMISSIBLE in evidence, and it is not proper to permit them to be read to the jury, except that when a witness has referred to some medical authority to sustain his opinion, the authority to which he refers may be introduced in evidence to contradict him. This rule is not abrogated nor modified by the section of the code declaring that historical works, books of science and art, and published maps or charts, when made by a person indifferent between the parties, are presumptive evidence of facts of general notoriety or interest therein stated. (Bixby v. Omaha etc. Bridge Co., 299.)

7. EVIDENCE—ADMISSIBILITY OF WRITTEN INSTRUMENT AS PART OF CONTRACT.—If parties, at the time of enter-

ing into a written contract, expressly strike out of it an instrument, which has not been perfected or executed, and which is understood to be no part of the contract, it is not afterward admissible in evidence as constituting a part of the contract. (Brown v. Markland, 629.)

8. EVIDENCE, PAROL—WHEN ADMISSIBLE TO INTERPRET CONTRACT.—Whenever the terms of a contract are susceptible of more than one interpretation, or a latent ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract, and to determine the object on which it was designed to operate. (Brown v. Markland, 629.)

9. EVIDENCE—SHORTHAND RENDERING OF FACTS.—It is competent for a witness, after testifying to an acquaintance for several years with the accused, to state, in general terms, that he and the woman to whom it is claimed he was married lived together as man and wife, and that he held her out as his wife. This is not the stating of a conclusion either of law or of fact, but is a shorthand rendering of facts. (Bynon v. State, 163.)

10. DISORDERLY CONDUCT — EVIDENCE — IDENTIFICATION.—Evidence of an attempt by persons to take hold of and detain one whom they have seen shortly before peeping into a window is admissible for the purpose of identifying him on his trial for such disorderly conduct. (Grand Rapids v. Williams, 396.)

11. EVIDENCE — CONFIDENTIAL COMMUNICATION BETWEEN HUSBAND AND WIFE, WHAT IS AND WHEN NOT ADMISSIBLE.—A letter which is claimed to be a confidential communication between a husband and wife is privileged and not competent to be received in evidence against either, if objected to by him or her. Hence, such a letter cannot be received in evidence against the person writing it to prove that he was the husband of the person to whom it was addressed or to identify him as one of the parties to an alleged marriage. (Lanctot v. State, 800.)

See Assault, 1; Bills of Lading, 2; Boundaries, 9; Carriers, 12; Corporations, 2, 3; Cotenancy, 2; Deeds, 5; Depositions, 2; Insurance, 5; Malicious Prosecution, 4; Negotiable Instruments, 18, 20, 21, 23.

EXECUTION.

1. EXECUTION—CUSTODY OF THE LAW.—A valid levy is essential to place property in the custody of the law. Hence, if a sheriff levies upon account-books of the judgment debtor without garnishing the persons from whom such accounts are due, and one to whom the sheriff delivers such books collects some of the accounts shown therein, the moneys so collected are not in custody of law, and hence are subject to garnishment on a writ against the judgment debtor. (Cedar Rapids Pump Co. v. Miller, 322.)

2. EXECUTION.—THE LEVYING UPON AND TAKING POSSESSION OF BOOKS OF ACCOUNT confers no interest in the accounts themselves, and if a person to whom the levying officer delivers the books, for the purpose of collecting the accounts shown therein, actually collects some of them, the moneys so collected remain the property of the judgment debtor, and are subject to execution against him. (Cedar Rapids Pump Co. v. Miller, 322.)

3. EXECUTIONS ISSUED BY JUSTICE TO ANOTHER COUNTY have no force unless authority is expressly given by statute. (Campbell v. Smith, 113.)

4. EXECUTION ISSUED BY JUSTICE TO ANOTHER COUNTY.—A statute providing that when a judgment debtor removes to

another county, or has property in any county other than that in which the judgment was rendered, execution may be issued by the justice rendering such judgment, "directed to any constable of such county," is mandatory, and an execution issued by such justice in one county, directed to "any lawful officer of said county," and sent to another county to be executed, is void. (Campbell v. Smith, 113.)

5. EXECUTIONS ISSUED BY JUSTICE — SUFFICIENT AUTHENTICATION.—If an execution is issued by a justice in one county and sent to another county to be executed, the certificate of the probate judge of the county in which the execution issued, indorsed thereon, that the person, naming him, who issued it was an acting justice of the peace for the county in which the judgment was rendered, is sufficient, under a statute providing that such execution "must be certified by the judge of probate of the county in which the judgment is rendered, or by a justice of the county to which it is sent, who has knowledge of the handwriting of the justice issuing it." The latter phrase has reference to the justice to whom the execution is sent, and not to the probate judge. (Campbell v. Smith, 113.)

6. EXEMPTIONS.—BURDEN OF PROOF to show that certain property is exempt from sale under execution is upon the claimant. (Porch v. Arkansas Milling Co., 895.)

7. EXEMPTIONS—GARNISHMENT.—Funds in the hands of a garnishee after judgment against him may be claimed as exempt by the debtor. The funds, if paid by the garnishee in satisfaction of the judgment, cannot be recalled by the debtor under his claim of exemption. (Blass v. Erber, 907.)

8. EXEMPTIONS IN PARTNERSHIP PROPERTY.—Partners are not, during the existence of the partnership, entitled to an individual exemption in the partnership property. (Porch v. Arkansas Milling Co., 895.)

9. EXEMPTIONS IN PARTNERSHIP PROPERTY.—A partner is not entitled to hold exempt from sale under an execution issued on a judgment against him for an individual debt, so much of his interests in the assets of the partnership as is equal in value to the exemptions from sale under process allowed him by law. (Porch v. Arkansas Milling Co., 895.)

10. PARTNERSHIP—SALE OF PARTNER'S INTEREST UNDER EXECUTION.—A partner's interest in firm property may be sold under an execution against him individually, but the purchaser acquires such interest subject to the rights of partnership creditors and the other partners, and he may be compelled to settle with the other partners precisely as would the defendant in the execution had not his interest been sold. (Swan v. Gilbert, 208.)

11. EXECUTION AGAINST INDIVIDUAL PARTNER, WHEN VOID.—An execution upon a judgment against a firm, so far as it purports to be against the individual property of its members, is absolutely void, though it will protect the officer who, in good faith, executes it. (Hammer v. Ballentyne, 643.)

12. EXECUTION AGAINST ONE PARTNER—VALIDITY OF LEVY.—A valid levy of execution against one member of a firm must cover his interest in the entire partnership property. Hence, a levy upon the partner's interest in a specified pile of partnership lumber is invalid where the pile does not include all of the partnership property. (Kunze v. Cox, 480.)

13. EXECUTION — PARTNERSHIP PROPERTY — LEVY AGAINST INDIVIDUAL PARTNER—INTEREST SUBJECT TO

LEVY.—While an execution creditor of an individual partner may levy upon the interest of the execution debtor in the partnership property, such interest must be treated as consisting of a right to an aliquot share of what remains after the payment of partnership debts and the adjustment of accounts between the partners. (Kunze v. Cox, 480.)

14. EXECUTIONS AGAINST PARTNERSHIPS — APPLICATION OF PROCEEDS.—An officer having executions against an insolvent partnership, and also against individual members of the firm, is required to make application of the proceeds of firm property to the payment of the executions against the firm, even though such executions are junior to those against the individual members of the firm. (Swan v. Gilbert, 208.)

15. EXECUTIONS—RIGHT OF OFFICER TO FOLLOW WRIT.—A sheriff who holds an execution issued against one partner individually is justified in following it, although the judgment creditor refers him to the files in the case showing that the note on which the judgment was entered was executed in the firm name, and claims that such execution was in fact for firm indebtedness. (Swan v. Gilbert, 208.)

16. EXECUTIONS AGAINST PARTNERSHIP — SHERIFF WHEN NOT LIABLE FOR FALSE RETURN.—A sheriff who holds for collection chattel mortgages upon property of an insolvent partnership, and also an execution against a partner individually, may apply the proceeds of the firm property to satisfy the mortgages, although part of them were executed after he received the execution, without being liable for a false return on the execution, when nothing remains to satisfy it. (Swan v. Gilbert, 208.)

17. EXECUTION SALES—REVERSAL OF JUDGMENT—RESTITUTION.—Plaintiff purchasing at his execution sale is, on reversal of the judgment under which the sale was made, entitled to the benefit of the order of restitution, to enable him to restore the property in specie, if he can, and if he cannot he is responsible for its loss. If the property is purchased by a third person, the measure of damages is the price it brought at the sale and interest, and if the defendant is the purchaser, there can be no recovery against the plaintiff, except for money paid, because the defendant has what he claims. (McCracken v. Paul, 948.)

18. EXECUTION SALES—SATISFACTION OF JUDGMENT WHEN SET ASIDE.—If a plaintiff purchases property at his own execution sale, and satisfies his judgment against the execution defendant pro tanto out of the proceeds, he is entitled to have such satisfaction annulled, upon his being subsequently compelled to account to a third person as the owner of such property. (De Loach Mill etc. Co. v. Little Rock Mill etc. Co., 942.)

19. MORTGAGES—SALE OF MORTGAGED CHATTELS ON EXECUTION—LIABILITY OF OFFICER.—An officer who sells mortgaged chattels under an execution issued in an attachment suit against the mortgagor, and delivers possession to the purchaser without requiring him to comply with the terms of the mortgage, is liable only for nominal damages, if the property sold remains within a short distance of where the mortgagee lives, and it is not injured, nor its value as security impaired. (State v. Bergner, 261.)

20. EXECUTION — WRONGFUL LEVY OF EXECUTION AGAINST INDIVIDUAL PARTNER—LIABILITY.—A plaintiff who, in person, or by his attorney, causes to be issued and delivered to an officer, an execution against the property of an individual member of a firm, when the judgment is against the firm by name, and there is no judgment against the individuals composing the

firm, is guilty of a trespass or tort, and is answerable for the consequences of the unlawful act. (Hamner v. Ballentyne, 643.)

21. EVIDENCE—ACTION FOR WRONGFUL LEVY OF EXECUTION AGAINST INDIVIDUAL PARTNER.—In an action by a member of a firm against one for the wrongful levy of an execution against his individual property, it is competent for the plaintiff to offer, in evidence, the judgment-roll, in the action against the firm, for the purpose of proving that the judgment upon which the execution was founded was against the firm and not against him. (Hamner v. Ballantyne, 643.)

22. EXECUTION SALES—LIABILITY OF PURCHASER TO REDEMPTIONER FOR WASTE.—A judgment creditor who redeems lands from a purchaser at an execution sale cannot recover damages for waste committed by such purchaser prior to redemption. (O'Connor v. Bank of Attalla, 146.)

23. EXECUTION SALES.—REDEMPTION BY THE JUDGMENT DEBTOR of his lands sold under execution reinstates the lien of the judgment for any balance remaining unpaid, and subjects the lands to a resale to satisfy such balance. (Flanders v. Aumack, 504.)

24. EXECUTION SALES.—REDEMPTION BY THE GRANTEE OF THE JUDGMENT DEBTOR from an execution sale of land bid in for less than the judgment reinstates the lien for the unpaid balance, and a resale of the land may be had to satisfy such balance, if the judgment lien has attached at the time that the transfer is made. (Flanders v. Aumack, 504.)

25. BONDS, FORTHCOMING—MISRECITAL IN.—If a forthcoming bond shows on its face that it was given for the forthcoming of certain property levied upon and claimed as exempt, identifies the contest with respect to the pendency of which it is given, and shows that the obligors bind themselves to the forthcoming of the particular property involved in the contest, it is sufficient as a statutory obligation and in respect to the summary proceedings upon it authorized by statute, and its validity or sufficiency is not affected by the fact that it erroneously recites the levy of an execution upon the property when the levy in question was in fact that of an attachment. (Troy v. Rogers, 110.)

26. JUDGMENT UNDER FORTHCOMING BOND—CONCLUSIVENESS OF—PARTIES BOUND BY.—If, in a contest of a claim of exemption, a forthcoming bond is executed, an assessment of the value of the property in contest by the court and a judgment sustaining the claim of exemption as authorized by statute are conclusive as against the parties to the suit and the sureties on the bond, no fraud or collusion intervening. (Troy v. Rogers, 110.)

27. BONDS, FORTHCOMING — FORFEITURE — RIGHT OF ACTION.—If, in a contest of a claim of exemption, a judgment is rendered sustaining the claim, and a forthcoming bond given in the action is returned forfeited, the exemption claimant may have execution issued upon the forfeited bond, or he may sue thereon in a separate action, and he is then entitled to recover as damages the value of the property claimed, as judicially determined in the contest proceeding. (Troy v. Rogers, 110.)

28. EVIDENCE—JUDGMENT RECORD.—The record of a judgment in a contest of a claim of exemption is admissible in evidence in an action on a forthcoming bond given by the plaintiff in such contest. (Troy v. Rogers, 110.)

See Husband and Wife, 4; Limitations of Actions, 4; Partnership, 8.

EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—JUDGMENTS AGAINST IN ANOTHER STATE.—Only the courts of the state appointing an executor or administrator have jurisdiction over him. A judgment entered against him in another state is void and cannot support an action against him in the state of his appointment. He has no capacity to sue or to defend in other states, except in some instances, when permitted by their laws to sue respecting assets there located. (Jefferson v. Beall, 177.)

See Vendor and Purchaser, 6.

EXEMPTIONS.

See Executions.

EXPERT EVIDENCE.

See Witnesses, 6.

EXPLOSIVES.

See Damages, 4; Nuisance, 8-5.

FALSE IMPRISONMENT.

FALSE IMPRISONMENT—WARRANT REGULAR ON ITS FACE.—If a person is imprisoned by virtue of a warrant issued by a court having jurisdiction of the subject matter and regular on its face, an action for false imprisonment cannot be maintained. (Tryon v. Pingree, 398.)

FIREARMS.

See Negligence, 3, 4, 14.

FISHERIES.

1. FISH DO NOT BELONG TO THE OWNER OF THE SOIL covered by the water in which they are, though he may have a sole and exclusive right to fish therein. His property in them is qualified and can be rendered absolute only by their capture. (State v. Theriault, 695.)

2. FISH.—THE RIGHT TO TAKE FISH FROM FLOWING WATERS, nonboatable, pertains solely to the owner of the lands through which such waters flow. It pertains to him personally and is a private right, but he does not own such flowing water and has only the right to use it properly while on its passage. Other landowners on different parts of the stream also have the right to take fish therefrom, and this right carries with it the common right to have fish inhabit and spawn in the premises, and for this purpose to have a common passageway to and from their spawning and feeding grounds. (State v. Theriault, 695.)

3. CONSTITUTIONAL LAW—STATUTE DEPRIVING A LANDOWNER OF HIS RIGHT TO FISH ON HIS OWN PREMISES.—A statute authorizing the fish commissioners of a state to place fish in a pond or stream, and thereupon to prohibit all fishing therein for three years, is not unconstitutional, though construed so as to prevent an owner of land from fishing in a stream constituting a part thereof during the time involved in such prohibition. It is not a destruction, but a regulation, of his right. (State v. Theriault, 695.)

4. CONSTITUTIONAL LAW—FISH.—A state may, by statute, authorize its officers to go upon a stream, nonboatable and running through the lands of a private proprietor, and stock it with fish, whether he consents or not. (State v. Theriault, 695.)

FIXTURES.

1. FIXTURES--CHATTELS PRESERVED BY AGREEMENT. If chattels are of such nature that they do not lose their distinctive identity by annexation, and do not thereby become so essentially a part of the structure as that their removal will materially injure or destroy the structure, or destroy or unnecessarily impair the value of the chattels, their original character may be preserved by agreement of the parties interested. (Landigan v. Mayer, 521.)

2. FIXTURES—AGREEMENT CONCERNING—RIGHTS OF PURCHASER.—A purchaser for value, and without notice of realty to which chattels have been annexed, is entitled to them as against one who claims them under a prior agreement, by which they were to preserve their original character and not lose their identity as chattels. (Landigan v. Mayer, 521.)

FORCIBLE ENTRY AND DETAINER.

CONSTITUTIONAL LAW—A STATUTE AUTHORIZING THE PLAINTIFF IN AN ACTION OF FORCIBLE ENTRY or detainer or of unlawful detainer to obtain a writ of restitution restoring him to the possession of the property described in his complaint upon giving a bond in such sum as the judge may order, with two or more sureties to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay and pay all costs that may be adjudged to the defendant and all damages he may sustain by reason of the writ of restitution, should it be found to have been wrongfully sued out, is not unconstitutional. It does not deprive any person of life, liberty, or property without due process of law. Especially is this true if the statute provides that the defendant may avoid the execution of the writ of restitution by giving on his part a bond as therein provided for. (State v. Prather, 729.)

FORFEITURE.

See Insurance, 22-25.

FORGERY.

FORGERY—INSTRUMENT NOT SUBJECT OF.—A written instrument purporting upon its face to give authority to the bearer to solicit and receive donations for a fund ostensibly under the control and charge of a certain organization, is not a "letter of attorney," or an "order for money," within the meaning of a statute making such instruments the subject of forgery. (People v. Smith, 392.)

See Negotiable Instruments, 21-23.

FORTHCOMING BONDS.

See Executions, 25-27.

FRANCHISES.

See Mandamus, 5-7.

FRAUD.

ACTIONS.—IF FRAUDULENT PURCHASES are made at different times, each purchase constitutes a distinct and separate act of fraud, for which the seller may maintain a separate action. (Reid, Murdock & Co. v. Ferris, 437.)

See Husband and Wife, 3; Limitations of Actions, 6.

FRAUDULENT CONVEYANCES.

1. VOLUNTARY CONVEYANCES.—Where it is claimed that a voluntary conveyance is fraudulent as against creditors, but the evidence is not sufficient to justify the court in avoiding it absolutely, but is adequate to excite a well-grounded suspicion respecting the adequacy of the consideration and the fairness of the transaction, the conveyance will be permitted to stand only as security for the consideration actually paid. (Withrow v. Warner, 501.)

2. FRAUDULENT TRANSFERS — DEED ABSOLUTE IN FORM INTENDED ONLY AS SECURITY.—The fact that a deed absolute in form is taken as security, instead of a mortgage, is to be considered in determining whether fraud was intended, but it must be upheld if shown to have been given in good faith and without any intent to defraud. (Rock v. Collins, 885.)

3. FRAUDULENT TRANSFERS.—A DEED ABSOLUTE ON ITS FACE, but intended as a mortgage, is not fraudulent as against creditors of the grantor for not expressing on its face the true nature of the transaction, where the grantee did not conceal its character nor claim an absolute title thereunder. (McFarlane v. Louden, 883.)

4. FRAUD.—THE FAILURE TO RECORD A CONVEYANCE intended as a mortgage for several months after its execution does not make it fraudulent, where there was no agreement to keep it from the records. (McFarlane v. Louden, 883.)

5. HUSBAND AND WIFE—FRAUDULENT CONVEYANCES BETWEEN.—Although a deed to an undivided interest in land executed by a husband to his wife in consideration of the discharge of her mortgage covering the whole tract is withheld from record for several years, and he obtains credit in the meantime by representing himself as the owner of the whole tract, this is not sufficient to subject the land granted to the claims of intervening creditors of the husband, in the absence of proof that the wife participated in or had any knowledge, of the fraud. (Campbell v. Remaly, 393.)

See Attachment, 14; Homestead, 5.

GARNISHMENT.

See Attachment.

GUARDIAN AND WARD.

See Homestead, 6.

HIGHWAYS.

1. HIGHWAY, PUBLIC, GRADE, RIGHT TO CHANGE.—The authorities of a town have no right to change the grade of a suburban public highway so as to cut off or prejudicially interfere with the right of access thereto of an adjacent property owner, when such change is made at the request and for the sole benefit of a street railway company. (Zehren v. Milwaukee Electric Ry. etc. Co., 844.)

2. HIGHWAYS, PUBLIC, PROPERTY OWNER'S RIGHT TO OBJECT TO ADDITIONAL BURDENS UPON AND CHANGES IN THE GRADE OF.—An electric street railway corporation has no right to construct and operate its road upon a public highway adjacent to a city or to change the grade thereof as against the objection of an owner of abutting property, nor can such right be granted to it by town authorities, unless it first makes compensation to such property owner. (Zehren v. Milwaukee Electric Ry. etc. Co., 844.)

3. HIGHWAYS, PUBLIC, ADDITIONAL BURDENS.—An interurban electric railway running upon a public highway through a country town is an additional burden thereon, to which the owner of adjacent property is not obliged to submit without compensation. (Zehren v. Milwaukee Electric Ry. etc. Co., 844.)

4. BICYCLES—TOLL FOR ON HIGHWAYS.—A statute authorizing an incorporated plank-road company to exact tolls, in a specified sum, for any "vehicle drawn by one or more animals" does not apply to bicycles. (Murfin v. Detroit etc. Road Co., 489.)

HOMESTEAD.

1. HOMESTEADS—WHEN NOT LOST.—A homestead when once acquired, and still occupied by the owner, is not lost by the death of his wife, the arrival of his children at the years of maturity, and their removal from the premises. (Gray v. Patterson, 937.)

2. HOMESTEADS—ABANDONMENT.—A homesteader who, on account of his advanced age and his inability to procure some one to live with him, takes up his abode with his grown daughter, who lives but a short distance away, and who constantly expresses a desire to return and live at his old home, does not by such removal abandon his homestead. (Gray v. Patterson, 937.)

3. HOMESTEADS—RIGHT OF WIDOW TO—FORFEITURE BY MISCONDUCT.—Under a constitutional provision that "if the owner of a homestead die, leaving a widow but no children, and said widow has no separate homestead in her own right, the same shall be exempt," such widow does not, by her abandonment of and living apart from her husband in another state, forfeit her right to his homestead upon his death, however reprehensible her conduct morally may have been. (Duffy v. Harris, 925.)

4. HOMESTEAD—PROCEEDS OF THE SALE OF AND OF OTHER PROPERTY.—If a homestead is included in a mortgage with other lands, and all are sold for a sum in excess of that due upon the mortgage, the surplus remaining after the payment of the mortgage debt will be deemed the proceeds of the sale of the homestead and exempt from liability for the debts of its owner, where the lands not included in the homestead are worth less than the amount of the mortgage debt. (Clancey v. Alme, 802.)

5. HOMESTEADS—FRAUDULENT CONVEYANCE OF.—Creditors of a homestead owner cannot attack a conveyance made by him of his homestead, on the ground that such conveyance is fraudulent as to them. (Gray v. Patterson, 937.)

6. HOMESTEADS OF MINORS—SALE BY PROBATE COURT. A probate court in which a guardianship of minors is pending has power to order the sale, for their benefit, of the homestead left to them by their surviving parent. (Merrill v. Harris, 929.)

HOMICIDE.

1. MURDER IN THE SECOND, AND NOT IN THE FIRST DEGREE, may be committed by the inflicting of injuries on a woman known to be quick with child, from which it dies after its birth, if there is no evidence of express malice or of an intent to take life, though such injury consisted of beating the mother unlawfully and in a manner dangerous to life. Malice in such a case is implied, and implied malice is the distinguishing characteristic of murder in the second degree. (Clarke v. State, 157.)

2. MANSLAUGHTER.—IF THE KILLING OF A HUMAN BEING IS NOT COMMITTED NEGLIGENTLY, but by an act

itself unlawful and dangerous to human life, from which malice is implied, it is proper to refuse to instruct the jury respecting manslaughter, for the offense is murder in the second degree. (Clarke v. State, 157.)

3. INDICTMENT FOR KILLING AN INFANT—SEX OF CHILD, WHETHER MUST BE DESCRIBED.—In an indictment for killing an unnamed infant by inflicting injury on its mother before its birth, it is not necessary to state the sex of the child. (Clarke v. State, 157.)

4. THE MURDER OF AN INFANT MAY BE COMMITTED BY INFLICTING INJURY ON IT OR ON ITS MOTHER while it remains in her womb, if therefrom it dies after first being born. It is otherwise if it dies from such injury while still in her womb. (Clarke v. State, 157.)

See Witnesses, 5.

HOSPITALS.

See Municipal Corporations, 4-a.

HUSBAND AND WIFE.

1. DEFINITION.—MATRIMONIAL COHABITATION IS the living together of a man and a woman, ostensibly as husband and wife, with or without sexual intercourse between them. (Cox v. State, 166.)

2. HUSBAND AND WIFE.—A note executed to and in the name of a husband and wife vests in them as joint tenants, and upon the death of either belongs wholly to the survivor. (Fiedler v. Howard, 865.)

3. HUSBAND AND WIFE—FRAUD UPON CREDITORS BY TAKING NOTE IN JOINT NAMES OF.—If a husband and wife have a homestead which he wishes to sell, but she refuses to join in a conveyance unless a note and mortgage, to be given for a part of the purchase price, are in the joint names of herself and husband, and they are so taken, the transaction is not fraudulent as against his creditors, and, upon his death, the whole title to such note vests in her, and the creditors have no interest therein. (Fiedler v. Howard, 865.)

4. THE COMMUNITY PROPERTY OF A HUSBAND AND WIFE is subject to execution against the husband for his separate debt to which the wife was not a party, though the effect of the satisfaction of such execution out of such property will be to leave the community without assets sufficient to pay its debts. (Morse v. Estabrook, 723.)

5. MARRIED WOMAN—SPENDTHRIFT TRUSTS—POWER OF TO CREATE IN HER OWN FAVOR.—Neither a married woman, nor a woman in contemplation of marriage, can place her property, which would otherwise be responsble for debts contracted with reference to it, beyond the reach of her creditors and still enjoy the use and benefit of it or of its income as fully and completely as she had done before. Hence, though the instrument by which she created the trust purports to authorize the trustee to pay her the income of the property free of the claims of her creditors, he will be required to pay out of such income any indebtedness created by her after her marriage and chargeable against her separate estate. (Brown v. Macgill, 334.)

See Evidence, 11; Fraudulent Conveyances, 5; Homestead, 3; Witnesses, 3-5.

IMPRISONMENT FOR DEBT.
See Statutes, 3, 4.

INDIANS.

INDIANS—JURISDICTION OF STATE COURTS OVER.—In the absence of any treaty or act of Congress to the contrary, a state court has jurisdiction of an action by a white man against an Indian belonging to, and residing with, a tribe on a reservation within the state, to recover moneys alleged to be due from him on account of goods sold and delivered at such reservation. (Stacy v. La Belle, 879.)

INDICTMENT.
See Homicide, 3.

INFANTS.
See Railroad Companies, 9-11.

INJUNCTION.

1. AN INJUNCTION BASED ON A VOID JUDGMENT or decree is itself void and not entitled to obedience. (Savage v. Sternberg, 751.)

2. INJUNCTION—PERSON NOT PARTY TO A SUIT CANNOT BE BOUND BY.—The fact that an injunction has been issued to a municipal corporation and its treasurer forbidding the payment of city warrants does not justify the refusal of that officer to pay such warrants on the demand of the owner thereof, when neither he nor any of his predecessors in interest were parties to the suit in which such injunction issued. (Savage v. Sternberg, 751.)

3. INJUNCTION IMPOSING TERMS THAT THE COMPLAINANT SHOULD SUBMIT TO A LIKE INJUNCTION.—It is within the power of a court of chancery in granting an injunction to a suitor to impose terms to the effect that he be restrained from doing the same acts which his adversary is enjoined from doing. (Sternberg v. Wolff, 494.)

4. NATIONAL BANKS.—AN INJUNCTION CANNOT ISSUE AGAINST A NATIONAL BANK before a final judgment in any suit, action, or proceeding in any state, county, or municipal court. (Hazen v. Lyndonville Nat. Bank, 680.)

5. AN INJUNCTION SHOULD NOT ISSUE against the directors or officers of a corporation, the effect of which must be to suspend its business and make its conduct in the ordinary methods impossible. It is better, if the business cannot otherwise be carried on, owing to dissensions among the directors, that a receiver should be appointed. (Sternberg v. Wolff, 494.)

6. INJUNCTION AGAINST VOID ORDINANCE.—The enforcement of a void city ordinance may be enjoined in order to prevent a multiplicity of suits at the instance of any person whose interests are impaired by it provided the rights of many persons are affected by the ordinance the same way. (Chicago v. Collins, 224.)

7. INJUNCTION WILL ISSUE AGAINST THE UNAUTHORIZED USE OF ANOTHER'S NAME in the conduct of a business, though he is not alleged to have been damaged by such use. (Bagby & Rivers Co. v. Rivers, 357.)

8. INJUNCTION AGAINST PROSECUTING A SUIT IN ANOTHER STATE OR COUNTRY.—The authority of a court of chancery to restrain persons within its jurisdiction from prosecuting suits in the courts of other states or of foreign countries is clear and indisputable. (Hazen v. Lyndonville Nat. Bank, 680.)

9. INSOLVENCY LAWS—INJUNCTION AGAINST PROCEEDINGS IN OTHER STATES TO AVOID.—As against creditors residing in a state wherein proceedings have been, or are about to be instituted against an insolvent debtor, an injunction may properly issue to prevent them from maintaining actions or proceedings in other states to avoid the effect of the insolvency laws of their domicile by seeking preferences or advantages by attachment or otherwise in such other state. (Hazen v. Lyndonville Nat. Bank, 680.)

10. INJUNCTIONS—PROCEEDINGS PENDENTE LITE TO AVOID THE EFFECT OF.—If a suit is brought to enjoin the prosecution of an action in another state, and the defendants, to avoid the effect of any injunction which may be issued, assign to a nonresident against whom any injunction which may issue must be inoperative, the court will do complete justice so far as as within its power, notwithstanding the attempted defiance of its authority, and to that end may compel the defendants to respond in damages. (Hazen v. Lyndonville Nat. Bank, 680.)

11. INJUNCTION BONDS.—ATTORNEY'S FEES, for defending an injunction suit at the trial on the merits may be recovered in an action on the bond, although the injunction was not the sole object of the action. (Hyatt v. Washington, 248.)

12. INJUNCTION BONDS—OBLIGEES.—If the names of two officials of a city are designated as such, and they are named as obligees in a bond given in a suit against the city for an injunction, any rights under such bond do not accrue to such officers as individuals, but as officers of the municipality. (Hyatt v. Washington, 248.)

13. INJUNCTION—ACTION FOR BREACH OF WARRANTY—WANT OF EQUITY.—If land sold is subsequently discovered by the purchaser to be public land, and the purchaser's son enters it as a homestead solely for his own use, and evicts his father, a bill to enjoin the purchaser's action for a breach of warranty is without equity, where it proceeds upon the theory that the purchaser should have notified the complainant of such discovery; that the purchaser should have entered the land and perfected the title for the vendor's benefit; that by fraud and collusion between the father and son the latter really entered the land for the use of his father; and that the alleged eviction was collusive and fraudulent. (Frix v. Miller, 57.)

See Equity, 15; Municipal Corporations, 17; Nuisance, 1, 6.

INJUNCTION BONDS.

See Appeal, 17; Injunctions, 11, 12.

INSOLVENCY.

1. INSOLVENCY LAW—ASSETS AFFECTED BY.—The insolvency law of Vermont is intended to embrace property of the insolvent situate in other states or countries and to distribute such property among his creditors, avoiding all preferences, and dissolving all attachments in favor of particular creditors made within a time specified before the adjudication. (Hazen v. Lyndonville Nat. Bank, 680.)

2. INSOLVENCY—DEBTS FOR LABOR AS PREFERRED CLAIMS.—A STATUTE making debts for labor preferred claims against the estate of an insolvent has reference to manual, rather than intellectual, labor, and the work intended to be covered by the statute is manual labor. (Michigan Trust Co. v. Grand Rapids Democrat, 486.)

3. INSOLVENCY—DEBTS FOR LABOR AS PREFERRED CLAIMS—MAILING CLERK.—Under a statute making debts for labor preferred claims against the estate of an insolvent, a debt due from an insolvent newspaper corporation to a mailing clerk for getting out, addressing, and mailing the paper to various subscribers is a debt for labor, as the work is mechanical and manual. (Michigan Trust Co. v. Grand Rapids Democrat, 486.)

4. INSOLVENCY—DEBTS FOR LABOR AS PREFERRED CLAIMS—INTELLECTUAL WORK.—Under a statute making debts for labor preferred claims against the estate of an insolvent, debts due from an insolvent newspaper corporation to those who gather news items, do editorial work, prepare and correct copy, and read proof, are not debts for labor, for such work is intellectual, not manual, and is not intended to be covered by such a statute. (Michigan Trust Co. v. Grand Rapids Democrat, 486.)

5. INSOLVENCY—PREFERRED CLAIM MAY BE ALLOWED, WHEN.—A court may, in favor of an intervenor, in proceedings against an insolvent, provide for the payment of a preferred labor claim out of a fund in court, although the claim was not filed until after a decree was rendered in favor of other intervenors, to secure the payment of preferred claims, and the decree has not been reopened or modified. (Michigan Trust Co. v. Grand Rapids Democrat, 486.)

6. INSOLVENCY LAWS—PERSONAL LIABILITY OF RESIDENT CREDITORS FOR TAKING PROCEEDINGS IN ANOTHER STATE TO AVOID THE EFFECT OF.—If creditors of a debtor, known by them to be insolvent, institute an action in another state and there attach his property, and, during the pendency of the action, a suit is brought against them in the state of their domicile, by the assignee of the insolvent, to enjoin them from taking judgment, and they, to avoid such suit, assign the cause of action to a person resident in such other state, who is thereupon substituted as plaintiff, and procures judgment and sells thereunder the property so attached, such creditors are, in the suit brought against them by such assignee, answerable for the damages resulting from their proceedings. (Hazen v. Lyndonville Nat. Bank, 680.)

See Corporations, 11, 12; Equity, 3; Injunctions, 9.

INSTRUCTIONS.

1. INSTRUCTIONS, IF MISLEADING, SHOULD BE REFUSED.—A charge, though technically correct, may be so expressed as to mislead the jury; and a court should always refuse to give such a charge. (Adams v. State, 17.)

2. JURY TRIAL—ASSUMPTION OF FACTS BY THE COURT. Where there is no conflict in the evidence, the court may, in instructing the jury, assume it to be true, and charge upon it directly without any hypothesis. (Bynon v. State, 163.)

3. TRIAL.—INSTRUCTIONS REQUESTED BUT FULLY COVERED by those already given are properly refused. (Spencer v. McLean, 271.)

4. INSTRUCTIONS — CRIMINAL LAW — REASONABLE DOUBT—"A FIXED CONVICTION."—There is no error in refusing to instruct the jury, in a criminal case, that they "are not satisfied beyond a reasonable doubt" unless they have "a fixed conviction" of the truth of the charge, for such an instruction is calculated to mislead them, on account of the ambiguous words, "a fixed conviction." (Adams v. State, 17.)

See Appeal, 10, 11; Trial.

INSURANCE.

1. INSURANCE — CONSTRUCTION OF POLICY — WRITTEN AND PRINTED PARTS.—The written portion of a fire insurance policy insuring benzine as part of a stock of merchandise overrides the printed portion of the policy forbidding it to be kept. (Phoenix In. Co. v. Flemming, 900.)

2. INSURANCE — CONSTRUCTION OF POLICY — WRITTEN AND PRINTED PARTS.—Benzine kept bottled in small quantities as part of a stock in trade is included in a fire insurance policy, containing a written description of the property insured as a stock of drugs and chemicals such as usually kept for sale in a drug-store, although the printed portion of the policy stipulates that it shall be void if benzine is kept without an agreement indorsed on the policy. The latter stipulation refers to keeping benzine in large quantities. (Phoenix Ins. Co. v. Flemming, 900.)

3. INSURANCE — AMBIGUOUS POLICY.—If language contained in a policy of insurance is ambiguous and susceptible of two constructions, any question arising out of such language must be resolved in favor of the insured. (Turner v. Fidelity etc. Ins. Co., 428.)

4. INSURANCE—DELIVERY OF POLICY—Whether or not an insurance policy has been delivered after its issuance does not depend upon its manual possession by the assured, but upon the intention of the parties as manifested by their acts or agreement, and where the contract of insurance is completed and put in writing, and the insured is notified by the insurance agent that this has been done, and that the policy is in his possession for the insured, this must be deemed a sufficient delivery of the policy to render it valid and binding. (Phoenix Assurance Co. v. McAuthor, 154.)

5. EVIDENCE—SECONDARY.—If an insurance policy or written contract is shown to be in the possession of the person who wrote it, but no notice is served upon him to produce it, his evidence that he does not know where such writing is, and that he cannot find it, is not sufficient to admit secondary evidence of its contents. (Phoenix Assurance Co. v. McAuthor, 154.)

6. INSURANCE—TOTAL LOSS—WHAT IS.—Total loss does not mean the absolute extinction of a building. The test is, whether the building has lost its identity and specific character, so that it can no longer be called a building. If, though some part of the building remains standing after a fire, that part is not sufficient to constitute in any sense a building, then, in contemplation of law, there has been a total loss. A total loss is not necessarily negatived by the fact that there is left standing some part of the building, worth more in place than the cost of removing it. (Santa Clara etc. Academy v. Northwestern Nat. Ins. Co., 805.)

7. INSURANCE—TOTAL DESTRUCTION OF A BUILDING, WHAT IS.—If the statute provides that when real property covered by an insurance shall be wholly destroyed, the amount written in the policy shall be taken to be the true value of the property insured and the true amount of loss and measure of damages when destroyed, it is not necessary to a total loss that the property insured shall be annihilated or reduced to a shapeless mass. When the identity of the structure as a building is destroyed, so that its specific character as such no longer remains, and there is nothing left but cellar walls and dilapidated foundations, the loss is total within the meaning of the statute. (Santa Clara etc. Academy v. Northwestern Nat. Ins. Co., 805.)

8. INSURANCE—AMOUNT OF RECOVERY WHEN SEVERAL PERSONS HAVE INSURABLE INTERESTS.—If an insured has some insurable interest in the property insured, the whole amount of damages to the property not exceeding the amount named

in the policy is recoverable by him, if the damages thereto reached that sum, though another person also has an insurable interest therein. (Santa Clara etc. Academy v. Northwestern Nat. Ins. Co., 805.)

9. INSURANCE—INSURABLE INTEREST IN ANOTHER PERSON, WHEN DOES NOT DIMINISH THE AMOUNT OF THE RECOVERY.—If a person for whom a building is in process of construction procures insurance thereon, the agent issuing the policy knowing that the contractors also have an insurable interest in the building, the insurer, on the destruction of the building, may recover the entire amount of the loss, though the contractor also had an insurable interest. (Santa Clara etc. Academy v. Northwestern Nat. Ins. Co., 805.)

10. INSURANCE AGAINST LOSS BY FIRE.—Though the contractor of a building in process of construction is bound to reconstruct it after its destruction by fire, this does not entitle the insurer to any diminution in the amount for which it is answerable upon a loss by such destruction. (Santa Clara etc. Academy v. Northwestern Nat. Ins. Co., 805.)

11. INSURANCE ON BUILDING—LIABILITY OF CONTRACTOR TO RECONSTRUCT, WHETHER DIMINISHES AMOUNT OF RECOVERY.—Where the owner of a building in process of construction insures it, the fact that the builder, on its destruction, before completion, is bound to reconstruct it, and does so, does not limit the amount which the owner is entitled to recover of the insurer. (Santa Clara etc. Academy v. Northwestern Nat. Ins. Co., 805.)

12. INSURANCE—ACCIDENT—DEATH BY POISON.—An insurance company, exempt, under an accident policy, from liability in case of death by poison, is not answerable for a death caused by poison accidentally administered. To defeat a claim under the policy it is not necessary that the poison should have been taken with intent to produce death. (Early v. Standard Life etc. Ins. Co., 445.)

13. INSURANCE—ACCIDENT—TOTAL DISABILITY. — When the business of the insured consists in making loans on personal property, the fact that after receiving an injury he goes to his office every day for a short time without doing any work or business there, does not show, as matter of law, that he is not wholly disabled from prosecuting any and every kind of business pertaining to his occupation. This is a question for the jury to determine under all the facts in the case. (Turner v. Fidelity etc. Co., 428.)

14. DEFINITIONS—"TOTAL AND PERMANENT LOSS OF EYESIGHT."—If a person has become permanently blind in one eye, he may, with strict propriety, be said to have sustained "total and permanent loss of eyesight." (Maynard v. Locomotive Engineers' etc. Assn., 602.)

15. INSURANCE—MUTUAL BENEFIT SOCIETIES—RECOVERY FOR "TOTAL AND PERMANENT LOSS OF EYESIGHT." A locomotive engineer, to whom a mutual benefit association has issued a policy of insurance, and who receives an injury, while engaged in a lawful employment, which causes the total and permanent loss of the sight of one eye, is entitled to recover therefor, where a by-law of the association provides that any member shall receive the full amount of his policy if, while engaged in any lawful occupation, he receives bodily injuries which alone cause the "total and permanent loss of eyesight," particularly where such injury disables him from pursuing his usual and accustomed occupation. (Maynard v. Locomotive Engineers' etc. Ins. Assn., 602.)

16. INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—BY-LAWS—INTERPRETATION OF.—The terms of a by-law of an association or corporation, organized for the purpose of mutual benefit and relief, must be interpreted liberally and reasonably, and not so as to favor the forfeiture of the rights of its members, or those dependent upon them. (Maynard v. Locomotive Engineers' etc. Ins. Assn., 602.)

17. INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—BY-LAWS—INTERPRETATION OF.—If the terms of a by-law of an association or corporation, organized for the purpose of mutual benefit and relief, are susceptible of two constructions, that must be adopted which will more nearly carry out the benign object of the association, and sustain the claim of an injured member. (Maynard v. Locomotive Engineers' etc. Ins. Assn., 602.)

18. INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—BY-LAW—CONSTRUCTION OF—AMENDMENT.—If a by-law of a mutual benefit society, providing that any member shall receive the full amount of his policy if, while engaged in any lawful occupation, he receives bodily injuries which alone cause the "total and permanent loss of eyesight," is amended after a member, while engaged in a lawful employment, receives an injury which ultimately causes the total and permanent loss of the sight of one eye, but before such loss of eyesight becomes permanent, so that the expression "total and permanent loss of eyesight" is made to read "total and permanent loss of one or both eyes," the only effect of the amendment is simply to make the true meaning of the words more apparent. (Maynard v. Locomotive Engineers' etc. Ins. Co., 602.)

19. INSURANCE—MORTGAGEE—SUIT BY.—In an action upon a policy of fire insurance on mortgaged property, where the loss, if any, is payable to the mortgagee, as his interest may appear, he may, in case of loss, recover the whole amount thereof, in his own name, if the mortgage debt exceeds the loss. (Peck v. Girard F. & M. Ins. Co., 600.)

20. INSURANCE—DENIAL OF LIABILITY—DAMAGES RECOVERABLE AFTER REFUSAL TO APPRAISE OR ADJUST LOSS.—If an insurance company, after a loss, not only neglects and refuses to appraise property fully destroyed by fire, and to make a complete adjustment of the loss, but denies all liability, the insured may bring suit, and the court, in assessing damages, is not limited to the appraisal of property that was not fully destroyed, but may assess damages on account of property fully destroyed, though it was not appraised through the fault of the defendant. (Stephens v. Union Assurance Soc., 595.)

21. INSURANCE—DENIAL OF LIABILITY—EFFECT OF OFFER TO ARBITRATE AFTER REFUSAL TO APPRAISE OR ADJUST LOSS.—If the insured, after a loss, makes reasonable efforts for an adjustment, but the insurance company refuses, for an unreasonable length of time, to appraise or adjust the loss, and denies liability, an offer by it to arbitrate after the insured has brought suit, does not affect the plaintiff's right to recover. (Stephens v. Union Assurance Soc., 595.)

22. INSURANCE—FORFEITURE—WAIVER.—Forfeiture of a fire insurance policy is not waived by an examination of the books of account of the insured by the insurer after knowledge of the forfeiture, when the policy provides that, in case of loss, the insurer can examine such books without waiving any condition of the policy. (Phoenix Ins. Co. v. Flemming, 900.)

23. INSURANCE—FORFEITURE—WAIVER.—If an adjuster for a fire insurance company, after a loss, states to the assured

that the policy is forfeited for a breach of its conditions, and replies, in response to a question, that the company will insist upon strict proof of the loss, he does not thereby waive any existing forfeiture. (Phoenix Ins. Co. v. Flemming, 900.)

24. INSURANCE—FORFEITURE—WAIVER.—The issuance of a policy of insurance with knowledge of facts which, by the terms of the policy, render it void, is a waiver of such ground of forfeiture, although the policy provides that its conditions shall not be waived by any officer or agent of the company unless such waiver is indorsed upon the policy. (Phoenix Ins. Co. v. Flemming, 900.)

25. INSURANCE — FORFEITURE — WAIVER — BURDEN OF PROOF.—When forfeiture of a fire insurance policy is claimed for breach of conditions concerning the keeping of fireworks, the fact that fireworks were on exhibition, or that one of the insurance agents, after the policy was issued, purchased fireworks in his individual capacity at the insured store, does not necessarily show that another agent issuing the policy knew of the presence of such fireworks, so as to constitute a waiver by him of such forfeiture. The burden of proof is on the insured to show that the agent issuing the policy knew at the time of the keeping of such fireworks, or that the other agent, with knowledge, did some act in the course of his duties as such, recognizing the continuing validity of the policy. (Phoenix Ins. Co. v. Flemming, 900.)

26. INSURANCE—COMMENCEMENT OF SUIT—WAIVER OF LIMITATIONS.—A letter from an insurer to the insured, requesting that the matter of a claim under the policy be allowed to rest until the adjuster for the insurer can see the insured or his attorney, constitutes a waiver of a provision in the policy limiting the time for furnishing proofs of loss and beginning an action on the policy, and the insured does not lose his right of action by delay after receiving such letter, although nothing more is heard about the adjuster. (Turner v. Fidelity etc. Co., 428.)

27. INSURANCE—PLEADING WAIVER WHERE PERFORMANCE OF CONDITION IS ALLEGED.—In an action against an insurance company, where the complaint alleges the performance of all conditions of the policy required to be performed on the part of the plaintiff, it is not absolutely necessary for the complaint to allege a waiver of a condition requiring the insured to submit to an examination, and, in case of disagreement as to the amount of loss, that the same should be ascertained by competent appraisers, where it is alleged that the defendant refused to pay the loss, denied and disclaimed any liability in the premises whatsoever, and still refuses to pay the loss, and refuses to assign any reason for its action, although it does not affirmatively appear from the complaint that any dispute had arisen which called for an appraisal and award, and the complaint does not affirmatively show that the plaintiff and defendant could not agree upon the amount of the loss. Proof of the waiver is admissible under the general allegations. (Stephens v. Union Assurance Soc., 595.)

28. INSURANCE—WAIVER OF CONDITION AS TO TITLE.—Notwithstanding any condition in a policy of insurance prohibiting waiver of conditions therein except in writing indorsed thereon and attached thereto, if an agent delivers a policy and receives the premium with knowledge of a breach of the condition in the policy respecting the sole and unconditional ownership of the title to the property, such condition is thereby waived. This is true notwithstanding the policy contains a provision prohibiting an agent from waiving any of its conditions except by writing thereon or attached thereto. (Santa Clara etc. Academy v. Northwestern Nat. Ins. Co., 805.)

29. INSURANCE—A MORTGAGE DOES NOT WORK A "CHANGE" OF INTEREST.—A mortgage given on property by the insured does not effect a change of interest, in violation of a policy which prohibits such change. A "change" of interest or title means a transfer, not an encumbrance. (Peck v. Girard F. & M. Ins. Co., 600.)

30. INSURANCE—CANCELLATION—BURDEN OF PROOF. If, in an action to recover insurance, the defense is set up that there was a cancellation of the policy before the loss by reason of a failure to pay the premium within five days after notice, as required by the policy, and the evidence shows a completed contract by the issuance and delivery of the policy, the burden of showing such cancellation is upon the defendant, and if there is a conflict of evidence the question must be determined by the jury. (Phoenix Assurance Co. v. McArthur, 154.)

31. INSURANCE—ACTION UPON POLICY—SUBMISSION OF INSURED, AFTER LOSS, TO EXAMINATION—REPLICATION, SUFFICIENCY OF.—If the insured is required, by the terms of a policy of fire insurance, to submit himself, after a loss, to an examination, under oath, by anyone whom the insurance company may name, it must give him notice to submit to such examination, or the requirement is waived. Hence, if the defendant pleads, in an action upon the policy, that the plaintiff had failed to submit to an examination as required by the policy, a reply to the plea is sufficient, and not demurrable, where it avers that no notice was given to the plaintiff, but that notice was given to her husband, who, as her agent, appeared and was examined, for such facts, if true, show that the company waived a personal examination of the insured. (Western Assurance Co. v. McGlathery, 26.)

32. INSURANCE—ACTION UPON POLICY WITH "IRON SAFE CLAUSE"—DELIVERY OF INVENTORIES—DEFENSE—DEMURRABLE PLEA.—If one of the conditions of a fire insurance policy upon a stock of goods is, that the insured will make a complete inventory of stock on hand, and, upon demand, after loss, deliver the last preceding inventory to the insurance company, the "last preceding inventory" required by such condition is that which was taken next preceding the issuance of the policy. Hence, it is no defense to an action thereon to plead that inventories were taken in May and December of the year preceding the issuance of the policy, and that the nondelivery of the inventory taken in May was a breach of the condition. Such a plea is demurrable. (Western Assurance Co. v. McGlathery, 26.)

33. INSURANCE—ACTION UPON POLICY WITH "IRON SAFE CLAUSE"—REPLICATION, WHEN INSUFFICIENT.—If the defendant, in an action upon a policy of fire insurance, after setting out the "Iron Safe Clause" of the policy in a special plea, avers, as a breach, that the plaintiff "did not keep a set of books as therein provided," a replication to such plea, averring that the plaintiff "had substantially kept a set of books from which the loss could have been ascertained," and that he had offered to produce "books and evidence" to meet the defendant's demand for books claimed by defendant to be necessary, which offer was refused by the defendant, is insufficient, on demurrer, because it does not show that the books offered were such as the plaintiff was required to keep. (Western Assurance Co. v. McGlathery, 26.)

34. INSURANCE—ACTION UPON POLICY WITH "IRON SAFE CLAUSE"—REPLICATION, WHEN SUFFICIENT.—If the defendant, in an action upon a policy of fire insurance, pleads that the plaintiff did not keep a set of books, clearly and plainly presenting "a complete record of business transacted, including all pur-

chases, sales, and shipments, both for cash and credit," as required by the "Iron Safe Clause" of the policy, a replication thereto is sufficient where it avers that the plaintiff "had substantially kept a set of books from which the loss could have been ascertained." (Western Assurance Co., v. McGlathery, 26.)

INTERSTATE COMMERCE.

CORPORATIONS, FOREIGN—INTERSTATE COMMERCE. Limitations imposed by a state upon the power of a corporation created under the laws of another state to make contracts within the state for carrying on commerce between the states violates that clause of the federal constitution which confers upon Congress the exclusive right to regulate such commerce. (Mearshon v. Pottsville Lumber Co., 560.)

INTERVENTION.

1. INTERVENTION—PARTIES—HOW MADE, BY PRAYER THAT NOTICE BE GIVEN—If a petition for intervention is filed in a pending chancery suit, with a prayer that notice of its filing be given to the parties to the pending suit, this is sufficient to make them parties to the intervention. (Drennan v. Mercantile Trust etc. Co., 72.)

2. INTERVENTION IN EQUITY, EFFECT OF—PARTIES.—If one, by intervention in a court of equity, asserts a right to property, of which the court has jurisdiction, he makes himself a party to the suit and cannot prosecute his right in any other forum. (Steele v. Walker, 62.)

3. INTERVENTION—PLEADING—INFORMATION AND BELIEF.—The averment of a material fact on the information and belief of the petitioner, in a petition for intervention in a pending chancery suit, is sufficient. (Drennan v. Mercantile Trust etc. Co., 72.)

See Attachment, 16; Insolvency, 5; Receivers, 2.

JOINT LIABILITY.

See Assault, 3.

JOINT TENANCY.

See Husband and Wife, 2.

JUDGES.

1. JUDGE OF COURT OF LIMITED JURISDICTION, WHEN NOT LIABLE FOR ACTIONS BEYOND HIS AUTHORITY.—If a judge of a court of limited jurisdiction having authority as an examining magistrate, upon a complaint made to him to issue a warrant for the arrest of a person complained of, does issue such warrant, hears evidence against such person under the belief that he has the right to try him for the offense charged, and having heard such evidence, instead of committing him for trial, imposes sentence upon him directing his imprisonment, such judge is not liable, if he acted in good faith and merely erred in deciding that he had jurisdiction to pronounce the judgment. (Robertson v. Parker, 889.)

2. JUDGE OF COURT OF LIMITED JURISDICTION, LIABILITY OF.—Where a judge of a court of limited or inferior jurisdiction secures jurisdiction of a person or cause, but in the progress of his investigation or proceeding decides that he has greater powers than he actually possessed, and therefore pronounces a judgment or sentence in excess of his powers and void, he is not personally answerable to a person subjected to imprisonment under such judgment or imprisonment. (Robertson v. Parker, 889.)

3. JUDGE OF COURT OF LIMITED JURISDICTION, LIABILITY OF FOR WILLFUL ACTS BEYOND HIS AUTHORITY. If a judge of a court of limited or inferior jurisdiction sentences and commits a person willfully, corruptly, maliciously, and with full knowledge of his want of authority, he is liable to an action by the person so sentenced or imprisoned. (Robertson v. Parker, 889.)

4. JUDGES AND QUASI JUDGES—DISQUALIFICATION OF. Where one performing the functions of a judge must decide questions of fact, his prejudice against either of the parties sufficient to disqualify him as a juror equally disqualifies him as a judge. (State v. Board of Education, 706.)

See Municipal Corporations, 23; Prohibition, 2.

JUDGMENT.

1. A JUDGMENT IS VOID AND ENTIRELY WORTHLESS and no one is bound to obey it, if the court pronouncing it had not jurisdiction over the subject matter of the action or of the persons sought to be bound by it. (Savage v. Sternberg, 751.)

2. JURISDICTION—PRESUMPTION OF.—If a judgment recites that each of the defendants was duly served with a copy of the summons and complaint, and that each failed to appear within the time prescribed, the fact that a document on file in the form of an affidavit of the service of process does not appear to have been sworn to does not overcome the recital of such service contained in the judgment, nor show that it is void. (State v. Superior Court, 724.)

3. JUDGMENTS BY DEFAULT—RELIEF FROM—ABUSE OF DISCRETION.—A judgment by default should be set aside for excusable mistake and an honest misunderstanding by defendant, if it appears that he was informed by his counsel on Monday that the case was set for Tuesday, and, believing that Tuesday of the next week was intended, he attended at that time, and then, for the first time, found that judgment had gone against him by default, at which time he immediately applied to the court to have the judgment vacated on terms, and showed that he had a good and meritorious defense, aside from the statute of limitations, which was available, although not pleaded. In such case, a refusal to set aside the judgment is an abuse of discretion which may be corrected on appeal. (Hanthorn v. Oliver, 518.)

4. JUDGMENT BY CONFESSION MAY BE ENTERED NUNC PRO TUNC as of the date of the filing of the statement of confession, where it was the duty of the clerk to have entered such judgment forthwith upon the filing of the statement, and the delay in entering it was due solely to his fault. (Doughty v. Meek, 282.)

5. THE ENTRY OF A JUDGMENT NUNC PRO TUNC validates all prior proceedings, including the issuing of executions. (Doughty v. Meek, 282.)

6. A JUDGMENT ENTERED NUNC PRO TUNC must be respected and enforced in the same manner and to the same extent as if entered at the proper time. (Doughty v. Meek, 282.)

7. JUDGMENT AGAINST A CESTUI QUE TRUST—LIEN OF AGAINST PURCHASERS WITHOUT NOTICE.—A judgment against a person for whose benefit another holds the legal title to lands is not a lien against a subsequent bona fide purchaser from the trustee without notice of the trust. (Block etc. Iron Co. v. Holcomb-Brown Co., 319.)

8. JUDGMENT OR DECREE—INTERLOCUTORY ORDERS—DESCRIPTION OF PROPERTY—CERTAINTY.—The general rule

is, that property which is the subject of a judgment or decree must be described with such certainty that it may be identified and distinguished from other property of like kind, but this degree of certainty is not required as to interlocutory orders, for they are not the source or foundation of title to property, and errors will readily be corrected by the court, at the instance of a party aggrieved. (Steele v. Walker, 62.)

9. RES JUDICATA.—A DECREE IN EQUITY DISMISSING A BILL WITHOUT PREJUDICE has no greater effect as res judicata than a voluntary nonsuit at law. (Hazen v. Lyndonville Nat. Bank, 680.)

10. JUDGMENT.—AN ACTION CANNOT BE SUSTAINED upon a judgment while an execution is in the hands of an officer and a levy thereunder remains undisposed of. (Thatcher v. Lyons, 677.)

11. JUDGMENT—VACATING ON MOTION.—A COURT IS NOT AUTHORIZED, years after the entry of a judgment, to vacate it on motion, where it contains a recital of the service of process, and a writ of prohibition may issue to prevent such vacating. If the defendant has any remedy, it is by a bill in equity, or, perhaps, by a petition. (State v. Superior Court, 724.)

12. JUDGMENT AND EXECUTION—SATISFACTION OF BY LEVY.—If a debtor of a judgment debtor was garnished and admitted his indebtedness, specifying the amount, and there is no showing that the garnishment was ever released, the plaintiff in the execution must be charged with the amount admitted to be due, and the judgment credited therewith. (Doughty v. Meek, 282.)

See Corporations, 4; Executions, 17; Executor and Administrator; Injunction, 1; Mortgage, 11; Prohibition, 1; Suretyship, 13, 15.

JUDICIAL NOTICE.

See Evidence, 1.

JUDICIAL SALES.

JUDICIAL SALES—SETTING ASIDE FOR ADVANCED BID.—A mortgagee or other interested party is not entitled to have a mortgage foreclosure sale of land set aside before confirmation for the purpose of allowing him to advance the bid of the purchaser, when the sale is in accordance with the decree directing it, and the property sold has brought its market value, and the purchaser and those conducting or controlling the sale have committed no fraud, unfairness, or other wrongful act. (Colonial etc. Mortgage Co. v. Sweet, 910.)

JURISDICTION.

1. JURISDICTION OVER SUBMERGED LANDS ALONG NAVIGABLE WATERS.—A state court is not deprived of jurisdiction, in an action of ejectment to recover submerged land, by the fact that the defendant is, on behalf of the federal government, in possession of the land for the purpose of erecting piers thereon in aid of navigation upon the Great Lakes and the rivers connecting them. (Scranton v. Wheeler, 484.)

2. JURISDICTION—ADMISSION, IN ANOTHER STATE, OF SERVICE OF PROCESS.—An admission of "due" personal service of a subpoena, by a defendant in another state, shows a clear intent to waive further service of process, and is sufficient to confer, upon a court of this state, jurisdiction of the subject matter in a foreclosure proceeding. (Jones v. Merrill, 475.)

See Corporations, 5, 6; Equity, 4; Indians; Judgment, 1, 2.

JUSTICE OF THE PEACE.

1. JUSTICE OF THE PEACE—APPEAL—JURISDICTION AFTER ADDITION OF NEW PARTIES AND DISMISSAL AS TO OTHERS.—If a justice's court has jurisdiction of the parties to a case before it, and of its subject matter, an appeal from the justice's court to a district court gives the appellate court jurisdiction of both. Hence, if new parties defendant are added on such appeal, and they entered an appearance, a dismissal, in the district court, as to the only party defendant in the justice's court, does not deprive the district court of jurisdiction of the case, or of the parties brought in. (Hamner v. Ballantyne, 643.)

2. OFFICER DE FACTO—PRESUMPTION THAT PERSON ACTING AS A JUSTICE OF THE PEACE IS.—If a judgment is rendered by a person purporting to act as a justice of the peace, he will be presumed to have been in possession of the office and to be at least a justice de facto, and his judgment is not subject to collateral attack. (McCormack v. Cleveland, 827.)

See Executions, 3-5; Statutes, 3; Witnesses, 2.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—HOLDING OVER—RENEWAL OF LEASE.—If a tenant for a term of years holds over, the landlord has a right to treat his act as a renewal of the lease for another year, although shortly before the expiration of the lease, and after the work of removal is begun, with an intention to vacate, the tenant becomes seriously sick and dies before such work is finished. (Mason v. Wierengo, 461.)

2. LANDLORD AND TENANT—HOLDING OVER.—THE ACT OF GOD does not excuse a lessee from the performance of his express contract to yield possession at the expiration of his lease. (Mason v. Wierengo, 461.)

3. LANDLORD AND TENANT—HOLDING OVER—INTENTION OF LESSEE.—The right of a landlord, in a lease for a term of years, to treat a holding over as a renewal of the lease for a year, is not affected by the intention of the tenant, and the latter cannot, therefore, defend against a claim for rent by showing that he had no intention of renewing his lease. (Mason v. Wierengo, 461.)

LARCENY.

DOGS—PROPERTY IN.—By the common law, dogs were not recognized as property and were not subjects of larceny, but, under a statute making it a crime to steal any money, goods, or chattels of another, one may be guilty of larceny in stealing a dog. It is a chattel. (Hamby v. Samson, 285.)

LEX LOCI.

See Negotiable Instruments, 7.

LIBEL.

1. LIBEL—WORDS NOT ACTIONABLE PER SE.—An untrue and malicious charge published in printing or writing is actionable when damages are shown to have resulted therefrom as a natural and probable consequence thereof, although the words used are not actionable per se. (Hollenbeck v. Ristine, 306.)

2. LIBEL.—To publish of one that he has for several years owed medical services, and, on being sued therefor, pleaded the statute of limitations, is actionable, if the charge is false and the publication results in his being discharged from his employment and the consequent loss of the means of support. (Hollenbeck v. Ristine, 306.)

3. LIBEL.—STATEMENTS AS TO ONE'S INTEGRITY AND FITNESS FOR A TRUST in which he is employed, whether they are mere expressions of opinion or not, are actionable if the criticism is founded upon false statements of matters of fact. (Hollenbeck v. Ristine, 306.)

4. LIBEL.—If there is evidence tending to prove that the plaintiff was discharged from his employment solely by reason of a libelous communication addressed by the defendant to the plaintiff's employer, the jury should be left to determine the cause of such discharge. (Hollenbeck v. Ristine, 306.)

5. LIBEL.—For words spoken or written in the course of a judicial proceeding or in giving evidence therein no action will lie. Hence the owner of real property cannot maintain an action for the disgrace and disrepute into which he is brought on account of the advertising for sale of such property under an unfounded claim. (Gore v. Condon, 352.)

6. LIBEL.—ACTION FOR WORDS NOT DEFAMATORY.—Though words published of a person are not, in contemplation of law, defamatory, yet if he who published them intentionally thereby caused loss or damage to another without justifiable cause and with malicious purpose, the person thus injured may recover in an action of tort the damages sustained as the natural and proximate result of the wrong. (Hollenbeck v. Ristine, 306.)

7. LIBEL—PRIVILEGED COMMUNICATIONS—MALICE.—A libelous communication cannot be privileged if actuated by malice. (Hollenbeck v. Ristine, 306.)

LIENS.

See Banks and Banking, 1.

LIMITATIONS OF ACTIONS.

1. LIMITATION OF ACTIONS—STATUTE CHANGING PERIOD.—A statute changing the period of limitation of actions applies only to prospective and not to antecedent transactions, unless the letter of the statute or its necessary and inevitable intent requires it. (Walker v. Burgess, 775.)

2. STATUTE OF LIMITATIONS.—Though a plaintiff is required to ask leave of the court before instituting an action his failure to apply for and obtain such leave does not enlarge the time allowed by the statute within which to commence such action. (Spokane County v. Prescott, 733.)

3. STATUTE OF LIMITATIONS.—AN ACTION AGAINST THE SURETIES ON THE BOND OF A COUNTY TREASURER for his default in not paying over moneys received by him is not within that provision of the statute of limitations providing for actions upon contracts in writing or arising out of written agreements, but is within the provision relating to contracts or liabilities not in writing and not arising out of a written instrument. The duties of the treasurer were fixed by law and not by his bond, and the liability sought to be enforced resulted from a breach of the duty imposed by statute and not by the bond. The undertaking of the sureties is collateral that their principal will perform his duties, and no action can be sustained against them when none can be sustained against him. (Spokane County v. Prescott, 733.)

4. STATUTE OF LIMITATIONS IN ACTIONS ON JUDGMENTS—SUSPENSION OF BY A LEVY OF EXECUTION.—A levy upon personal property operates as a satisfaction of the judgment for the time being and suspends the right to action thereon. Hence, in computing the time in which an action may be

maintained upon a judgment, the period while the right of action was suspended by the levy of an execution must be excluded. (Thatcher v. Lyons, 677.)

5. LIMITATION OF ACTIONS—ACCOMMODATION NOTE OF STOCKHOLDERS OF CORPORATION—PAYMENT BY COMPANY.—A joint note executed by the individual stockholders of a corporation, for its accommodation, is not taken out of the statute of limitations by a payment made by the company, where there is nothing to show that the makers intended to give the company authority to extend the note beyond the statutory period. Such an intention is not shown by the fact that all parties knew the note to be accommodation paper, that payments made by the company were made on its own behalf, upon an obligation which it was morally bound to pay, and that the makers wished and expected it to pay. (Patterson v. Collier, 440.)

6. DEEDS—LAND INCLUDED BY FRAUD—LIMITATIONS.—If land not intended to be conveyed is included in a deed through the active fraud of the grantee and without the knowledge of the grantor, who continues in possession, the statute of limitations does not begin to run against him until he has knowledge of the fraud or such notice as puts him on inquiry. (Davis v. Monroe, 581.)

7. LIMITATIONS OF ACTIONS—RIGHT OF ASSIGNEE OF NOTE TO PLEAD.—The assignee of a note may plead the statute of limitations against a setoff based upon a claim against his assignor. (Walker v. Burgess, 775.)

See Suretyship, 3.

MAGNETIC VARIATION.

See Boundaries, 7.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION OF CIVIL SUIT BY SUMMONS ONLY.—An action for damages for the malicious prosecution of a civil suit without probable cause cannot be maintained, when the process in the suit so prosecuted is by summons only, and is not accompanied by the arrest of the person or seizure of property or other special injury, not incident to all similar suits. (Smith v. Michigan Buggy Company, 242.)

2. MALICIOUS PROSECUTIONS—EVIDENCE.—In an action for malicious prosecution based upon an action by an executive officer for an alleged conspiracy to obstruct him in the exercise of his right to examine, in his official capacity, the books of another whether he was acting in the exercise of his lawful right to examine, in his official capacity, or in his private capacity in attempting to make such examination, is a material inquiry, and evidence that he was merely seeking to aid an individual in obtaining access to the records, and an examination of such books, is relevant and admissible. (Tryon v. Pingree, 398.)

3. MALICIOUS PROSECUTION—PROBABLE CAUSE.—If, in an action for malicious prosecution, it is shown that the defendant, before the commencement of the prosecution, made a full and fair statement of the facts to counsel and was advised that they constituted a criminal offense, and, believing and relying upon such advice, commenced the criminal proceeding, he is not guilty of malicious prosecution. (Tryon v. Pingree, 398.)

4. MALICIOUS PROSECUTION—EVIDENCE OF WANT OF PROBABLE CAUSE.—The acquittal of a defendant on the trial of a criminal charge is not prima facie evidence of want of probable cause for the prosecution. (Eastman v. Monastes, 531.)

MANDAMUS.

1. MANDAMUS.—A DEMAND FOR THE PERFORMANCE OF A PUBLIC DUTY need not precede the application for a writ of mandate, when it appears that the performance of such duty has been discontinued without any definite intention of resuming it. (State v. Spokane Street Ry. Co., 739.)

2. MANDAMUS—DEMAND AS A PREREQUISITE TO A SUIT FOR.—Where the duty to be performed is of a public nature or affecting the public at large, it is not necessary that a demand for its performance precede an application for a writ of mandate. Hence a writ of mandate to compel the operation of a street railway may issue, though a demand for such operation did not antedate the application for the writ. (State v. Spokane Street Ry. Co., 739.)

3. MANDAMUS FOR THE PERFORMANCE OF A PUBLIC DUTY, RIGHT OF PRIVATE CITIZEN TO APPLY FOR.—Private citizens may move for a mandamus to enforce a public duty, not due to the government as such, and hence may apply for a writ to compel the operation of a street railway. (State v. Spokane Street Ry. Co., 739.)

4. MANDAMUS FOR THE PERFORMANCE OF A PUBLIC DUTY—INTEREST SUFFICIENT TO SUPPORT AN APPLICATION FOR.—One who owns, resides upon, and has improved property near the end of a street railway line, relying upon its continued operation, has such an interest that he is entitled to maintain an application for a writ of mandate to compel the resumption of the operation of such line, if it has been discontinued. (State v. Spokane Street Ry. Co., 739.)

5. MANDAMUS TO COMPEL OPERATION OF AN UNPROFITABLE LINE OF RAILWAY.—The fact that the operation of a street railway has proved unprofitable constitutes no defense to an application for a writ of mandate to compel the resumption of such operation. The railway corporation cannot retain its franchise, and, at the same time, refuse to perform its duties. (State v. Spokane Street Ry. Co., 739.)

6. FRANCHISE, WANT OF, AS A DEFENSE TO AN APPLICATION FOR A WRIT OF MANDATE.—A street railway corporation which has for several years continuously and without objection occupied the streets of a municipality for its railway purposes cannot resist an application for a writ of mandate to compel it to continue the operation of such railway on the ground that it has no grant of a franchise from such municipality. Under these circumstances the city could not, as against the railway, raise the objection of the absence of such grant; neither can the railway raise it against the city. (State v. Spokane Street Ry. Co., 739.)

7. STREET RAILWAYS—MANDAMUS TO COMPEL OPERATION OF.—If a corporation entitled to construct and maintain a street railway does construct and maintain it, and thereafter discontinues such operation, it omits a duty which it owes to the public and may, by a writ of mandamus, be compelled to resume the performance of such duty. It is no defense to the application for such writ that the city might, on proper proceedings, forfeit the franchise of the railway. (State v. Spokane Street Ry. Co., 739.)

8. MANDAMUS IS THE PROPER REMEDY to compel a city treasurer to pay warrants properly drawn upon him. (Savage v. Sternberg, 751.)

9. MANDAMUS—PARTIES TO APPLICATION FOR.—To a proceeding to compel a city treasurer to pay warrants issued by it, the city is not a necessary party. (Savage v. Sternberg, 751.)

MARRIAGE AND DIVORCE.

1. MARRIAGE, PROOF OF FOREIGN, WHEN SUFFICIENT. If a foreign marriage is shown to have been solemnized in church by a person assuming the office of a priest or minister, it will be presumed, in favor of the marriage, that it is in accordance with the law of the country, and valid. If such a marriage is shown, especially if followed by cohabitation, the burden is on him who denies its validity to show that the law required some further act to make it valid. (Lanctot v. State, 800.)

2. ALIMONY—POWER OF COURT TO PROVIDE FOR AFTER A DIVORCE.—Under a statute declaring that if a judgment provide for alimony or other allowance for a wife and children, or either of them, the court may, from time to time, on petition of of either party, revise and alter such judgment respecting the amount of alimony or allowance, the court which, at the granting of a divorce, made no provision whatever for alimony or allowance, cannot subsequently and after expiration of the term make a provision upon these subjects. (Bassett v. Bassett, 863.)

See Bigamy, 3; Parent and Child, 3-5.

MASTER AND SERVANT.

1. MASTER AND SERVANT—DUTY OF SERVANT IN RESPECT TO DEFECTS IN TOOLS AND APPLIANCES.—A master may rely on the duty of his servant to observe the defects and dangers which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work. (Borden v. Daisy Roller Mill Co., 816.)

2. MASTER AND SERVANT—ASSUMPTION OF RISKS.—If it is no part of the duty of an employé to take goods up and down on an elevator, the dangers attending that work are not incidental to his employment, nor assumed by him by virtue of his contract of service although he understands how to run such elevator and has used it a number of times. (Dallemand v. Saalfeldt, 214.)

3. MASTER AND SERVANT—ASSUMPTION OF RISKS.—If an employé performs a particular service outside the scope of his employment by order of his master, given through a foreman, the risk of injury while thus employed is not necessarily assumed by him by virtue of his employment, and though he has knowledge of the dangers of such service, he is not bound to disobey on pain of assuming the risk, but may perform the service and hold the master liable, unless the danger is such that an ordinarily prudent man would not encounter it. This rule applies to a servant using an elevator with knowledge of its unsafe condition. (Dallemand v. Saalfeldt, 214.)

4. MASTER AND SERVANT — ASSUMPTION OF RISK — QUESTION OF FACT.—The question whether one employed to do a certain kind of work, and who was killed while doing another kind, was a mere volunteer, or was acting under the order of one having authority to direct him, is for the jury to determine, where a foreman gave such order to a group of men of which the deceased was one without specifying which was to act; and the deceased had done such work before and had not been forbidden to do it. (Dallemand v. Saalfeldt, 214.)

5. NEGLIGENCE — CONTRIBUTORY — EVIDENCE.—A finding that an employé, killed by falling down an elevator shaft, was at the time exercising due care for his safety, is justified by evidence that he was an intelligent, sober, and careful man, when there was no eye-witnesses to the accident and no countervailing evidence. (Dallemand v. Saalfeldt, 214.)

6. NEGLIGENCE—PERSON INJURED, WHEN NOT AN EMPLOYE.—If a person goes to a window to receive pay due to a discharged employé of a corporation, and is there injured through the negligence of another employé, the person so injured is not a coemployé, and hence is not precluded from recovering for such injury. (Carroll v. Chicago etc. R. R. Co., 871.)

7. MASTER AND SERVANT—NEGLIGENCE OF ELEVATOR PROPRIETOR.—The fact that the owner of an open elevator who operates, or allows it to be operated, with the doors leading into it open, with a bar across them, and the horizontal edge of the partition projecting downward from above, so as to make it unsafe to one on the ascending elevator and necessarily standing near the opening to work the cable, when taken in connection with the fact that such elevator is thus maintained in violation of a city ordinance, is sufficient to establish the negligence of the owner of the elevator toward an employé who is killed by falling into the shaft while operating the elevator. (Dallemand v. Saalfeldt, 214.)

MECHANICS' LIEN.

1. MECHANICS' LIEN.—SERVICES FOR WHICH MAY BE CLAIMED.—One agreeing to furnish a plant for the manufacture of gas and a man to operate it for thirty days, to test the machinery, is entitled to assert a mechanics' lien for the services of such man. (Peatman v. Centerville Light etc. Co., 276.)

2. MECHANICS' LIEN—SERVICE FOR WHICH MAY NOT BE ASSERTED.—One furnishing a plant to manufacture gas, and a man, for thirty days after its completion, to instruct the superintendent, is not entitled to a mechanics' lien for the value of the services rendered in such instruction. (Peatman v. Centerville Light etc. Co., 276.)

3. MECHANICS' LIEN—SERVICES FOR WHICH CANNOT BE ASSERTED.—If in a contract to furnish machines is also included the right to use certain patent rights, a mechanics' lien cannot be asserted for the value of the use of such rights. (Peatman v. Centerville Light etc. Co., 276.)

4. MECHANICS' LIEN INCLUDING CLAIMS OF INDEFINITE AMOUNT FOR A PURPOSE FOR WHICH A LIEN DOES NOT EXIST.—If one agrees to furnish a gas plant, to instruct the superintendent for thirty days, and also to give the right to use certain patent rights, all for a gross sum specified, and it does not appear what part thereof was for the two latter items, no lien can be established for any part of the demand. (Peatman v. Centerville Light etc. Co., 276.)

5. MECHANICS' LIENS—OIL-WELL.—A mechanic's or materialman's lien may be had and enforced against an oil-well for labor done and material furnished in drilling such well. Oil-wells are "structures" within the meaning of the mechanic's lien law. (Skeel v. Gallagher, 250.)

6. MECHANICS' LIENS—REPAIRS OR FIXTURES.—If a mechanic, at the request of the lessee of a building, puts therein doors and casings, wainscoting attached with screws to strips nailed to the wall, and veneering also nailed to the wall, he is entitled to a mechanic's lien on the lessee's interest for his labor and materials. Such materials, when placed in position, constitute alterations or repairs, and not domestic or trade fixtures. (Matthiesen v. Arata, 535.)

7. MECHANICS' LIENS—BUILDING WHETHER NEW OR ONLY ALTERED.—Under a statute giving a lien for work done or material furnished in erecting a building, the lien cannot be en-

forced for alteration or repairs, but if the structure of the building is so completely changed that in common parlance it may properly be called a new building or a rebuilding, it comes within the statute. Newness of structure in the main mass of the building, an entire change of external appearance which denotes a different building from that which gave place to it, though some parts of the old may have entered into it, is what constitutes a new building, as distinguished from one altered or repaired. (Warren v. Freeman, 583.)

8. MECHANICS' LIENS—QUESTION OF LAW.—Whether a structure is a new one, as distinguished from an old one merely repaired or altered, so as to confer a right to a mechanic's lien, is a question for the trial court, when the evidence descriptive of the changes made in the old building is not contradicted. (Warren v. Freeman, 583.)

9. MECHANICS' LIEN—PERFECTING IN FAVOR OF ASSIGNEE.—An assignment of a debt before the lien is perfected invests the assignee with the right to perfect and file the lien. (Peatman v. Centerville Light etc. Co., 276.

10. MECHANICS' LIEN.—THE FILING OF A CLAIM for a mechanics' lien within the time prescribed in the statute is not essential except as against purchasers or incumbrancers in good faith without notice, whose rights accrue after the expiration of the time fixed for filing the statement. (Peatman v. Centerville Light etc. Co., 276.)

11. MECHANICS' LIENS—PLEADING CONTENTS OF LIEN NOTICE.—Although a complaint for the foreclosure of a mechanic's lien must show affirmatively that the lien notice contained all of the statutory requirements, the statute is sufficiently complied with if a copy of such notice is set out bodily in the complaint, or is made a part thereof as an exhibit. (Matthiesen v. Arata, 535.)

See Mortgage, 13.

MEDICAL BOOKS.

See Evidence, 6.

MISJOINDER.

See Pleadings, 4.

MORTGAGES.

1. A DEED ABSOLUTE ON ITS FACE may be shown to be a mortgage. (McFarlane v. Louden, 883.)

2. A CONVEYANCE ABSOLUTE IN FORM, but intended to secure the payment of a debt, is a mortgage, does not convey the legal title, and an action of ejectment cannot be maintained thereon. (Snyder v. Parker, 726.)

3. A DEED TO SECURE A DEBT, though absolute in form, amounts merely to a mortgage, and does not transfer the title to the property. (Peck v. Girard F. & M. Ins. Co., 600.)

4. A MORTGAGE PASSES THE TITLE, and the mortgagee may take immediate possession, unless it appears by express stipulation or necessary implication that the mortgagor is entitled to remain in possession until default. After the law day, the legal estate is absolute in the mortgagee, and the mortgagor has nothing left but an equity of redemption. (Fields v. Clayton, 189.)

5. MORTGAGE — CONSIDERATION. — ACTUAL LIABILITY incurred by becoming a surety on a redelivery bond is sufficient

consideration for a mortgage given as indemnity to such surety. (Landigan v. Mayer, 521.)

6. MORTGAGE.—THE GRANTEE OF A MORTGAGEE, after condition broken, taking possession of property, stands in the same relation to it as the grantor would have stood had he not conveyed. He holds possession before foreclosure as trustee of the mortgagor, and is bound to preserve the premises from waste and to apply the rents and profits to the payment of the mortgage debt. (Fields v. Clayton, 189.)

7. MORTGAGES—PROTECTION TO MORTGAGEE.—A bona fide mortgagee, or his assignee of the mortgage, without notice of a prior claim, is entitled to the same protection as a bona fide grantee without notice. (Landigan v. Mayer, 521.)

8. MORTGAGES — ASSIGNMENT — NOTICE OF PRIOR CLAIMS.—An assignee of a mortgage, with notice of prior claims against his assignor, is protected against such claims, if they were invalid for want of notice as against the assignor. (Landigan v. Mayer, 521.)

9. MORTGAGE, ASSIGNMENT OF, FAILURE TO RECORD. A transfer before maturity of a note secured by a mortgage passes the security as an incident, and if the transferee has possession of the note, his rights cannot be prejudiced by any subsequent transfer which the mortgagee may make, though his title, so far as the public records disclose, appeared to be perfect. The possession of the note by the transferee was of itself sufficient to charge all persons with notice of his interest therein. (Miller Brewing Co. v. Manasse, 854.)

10. A FORECLOSURE SALE DIVESTS the title of all the parties to the suit, and hence the mortgagor plaintiff therein cannot assert against the purchaser tax titles held by him prior to such sale. (Ames v. Storer, 813.)

11. JUDGMENTS—CONCLUSIVENESS.—One not made party to foreclosure proceedings is not bound by the decree therein, and may attack the mortgage for want of good faith, or a valid consideration, as though such decree had not been entered. (Landigan v. Mayer, 521.)

12. MORTGAGES—FORECLOSURE—PROTECTION TO PURCHASER.—A purchaser under mortgage foreclosure is entitled to the same protection against prior claims as the mortgagee had under the mortgage. (Landigan v. Mayer, 521.)

13. MECHANICS' LIENS — MORTGAGE LIENS — SUPERIORITY.—A mortgage given by the vendee to secure the purchase money for land, or to secure the repayment of money procured to pay such purchase money, and executed at the time of the execution of a deed to the land to the vendee, and as part of the same transaction, creates a lien superior to that of a mechanic's lien for materials furnished to such vendee and used in the construction of a building on the land, both before and after the execution of the mortgage, where part of such materials were furnished and used before the execution of the deed, and while the vendee supposed he was the owner of the land, though in fact he had no title to, or interest therein at that time. (Birmingham B. and L. Assn. v. Boggs, 147.)

See Assignment; Fraudulent Conveyances, 2-4.

MULTIFARIOUSNESS.

See Pleading, 8.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—POWERS GRANTED TO BY ANOTHER STATE.—A municipal corporation created and existing in one state has no right or power to accept a privilege granted to it by the legislature of another state to construct and maintain a highway in the latter. Hence the municipality cannot be held answerable for injuries caused by defects in, or want of repair of, such highway. (Becker v. La Crosse, 874.)

2. MUNICIPAL CORPORATIONS—EXCLUSION OF SLAUGHTERHOUSES.—If a city has authority under its charter to provide for the exclusion of slaughterhouses from its limits, it has power to pass an ordinance prohibiting the use of slaughterhouses established and in operation within the city at and prior to the time of the passage of such ordinance. (Portland v. Meyer, 538.)

3. CONSTITUTIONAL LAW—EXCLUSION OF SLAUGHTERHOUSE FROM CITY.—An ordinance excluding from a city a slaughterhouse already in existence and operation within its limits is a legitimate exercise of the police power, and does not violate any constitutional right of the owner. (Portland v. Meyer, 538.)

4. MUNICIPAL CORPORATIONS—PESTHOUSES AND HOSPITALS.—The delegation to a municipality of the power to erect and maintain pesthouses and hospitals does not deprive a private citizen of the right to complain of any special injury sustained by him as a consequence of the exercise of the power. There is no presumption of an intent on the part of the legislature to sanction any act or use of property which will create a nuisance injurious to the property of another. (Baltimore v. Fairfield Imp. Co., 344.)

5. HOSPITALS AND PESTHOUSES.—The mere power to erect and maintain hospitals and pesthouses does not imply or include the further power to erect and maintain them in such a way or in such a place as will cause injury to others. (Baltimore v. Fairfield Imp. Co., 344.)

6. MUNICIPAL CORPORATIONS — ABANDONMENT AND LOSS OF RIGHT TO MAINTAIN A PESTHOUSE.—If a municipal corporation authorized by statute to erect and maintain hospitals and pesthouses, after using a tract of land for many years for that purpose, discontinues that use, burns its pesthouse and other buildings, and obtains property elsewhere and there isolates contagious diseases, and owners of real property adjacent to the tract first used divide their property into building lots, many of which are sold and occupied for residence purposes, the municipality has no right to revive the use of the first tract as a place at which to keep persons suffering from leprosy and other contagious diseases. Especially will the municipality be enjoined from placing a leper on such tract without taking such measures as will insure his isolation and prevent the communication of his malady to others. (Baltimore v. Fairfield Imp. Co., 344.)

7. MUNICIPAL CORPORATIONS—POWER TO CONTRACT FOR ELECTRIC LIGHTS.—A city may make a valid contract for the establishment of an electric light plant without having money in its treasury at the time which can be applied upon such contract, where there is no law or charter provision which prohibits it. (Mitchell v. Negaunee, 468.)

8. MUNICIPAL CORPORATIONS — RIGHT TO SUBMIT QUESTION OF ELECTRIC LIGHTS AT SPECIAL ELECTION.—The electors of a city may, if empowered by its charter, authorize the installing of an electric light plant at a special election. (Mitchell v. Negaunee, 468.)

9. MUNICIPAL CORPORATIONS — ELECTRIC LIGHT PLANTS—OWNERSHIP—PUBLIC SERVICE.—The furnishing of electric lights is a public service. Hence, the legislature may, under proper restrictions, authorize a city to own electric lighting plants, not only to light the streets and alleys of the city, but also to furnish lights to private parties. (Mitchell v. Negaunee, 468.)

10. MUNICIPAL CORPORATIONS—POWER TO TAX VACANT LANDS TO PAY FOR ELECTRIC LIGHTS.—A city, authorized to tax lands for public purposes, has power to tax vacant lands within its corporate limits, where the legislature has made no discrimination in their favor, for the purpose of installing an electric light plant within the city, to furnish not only lights needed by the city as a municipality, but lights for private individuals, although such lands, by reason of their remoteness, will not be benefited by electric lights. (Mitchell v. Negaunee, 468.)

11. MUNICIPAL CORPORATIONS—RIGHT TO IMPOSE LICENSE FOR USE OF STREETS.—The use of the public streets of a city is not a privilege, but a right, and the city cannot exact a license for the use of such streets by an individual or the public in a reasonable manner. (Chicago v. Collins, 224.)

12. MUNICIPAL CORPORATIONS—ORDINANCE CREATING DOUBLE TAX.—An ordinance of a city providing that money received from license fees imposed thereby on all wheeled vehicles shall be expended in improving the public streets, creates a double tax and is void, when such vehicles are taxed at their value, for general purposes. (Chicago v. Collins, 224.)

13. MUNICIPAL CORPORATIONS—VOID LICENSE TAX.—A city may exact an occupation license for vehicles used in the transportation of goods and merchandise, or of passengers, or for other purposes of traffic, but it cannot impose a license tax for the mere use of the streets. (Chicago v. Collins, 224.)

14. MUNICIPAL CORPORATIONS—VOID LICENSE TAX FOR USE OF STREETS.— A city has no power to impose by ordinance, a license fee by way of a tax on every person using wheeled vehicles on its streets for their individual use exclusively in their own business or for their own pleasure, as a means of locomotion. (Chicago v. Collins, 224.)

15. CONSTITUTIONAL LAW — CONTRACTS — STREET ASSESSMENTS.—A provision in a city charter that a street may be improved at the expense of the abutting owner, and that when thus improved it shall not again be improved in the same manner, does not, though the owner has paid for such improvement, constitute a contract with the state. Hence the legislature may thereafter constitutionally remove the limitation, and authorize the city to reimprove or rebuild the street and assess the cost thereof to the abutting property. (Ladd v. Portland, 526.)

16. MUNICIPAL CORPORATIONS—STREET ASSESSMENTS. The power to assess the cost of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily reposed in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations. It is, however, never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms. (Ladd v. Portland, 526.)

17. MUNICIPAL CORPORATIONS.—BREACH OF PUBLIC TRUST—INJUNCTION.—A municipality is charged with a public trust, and if it is about to commit an act clearly illegal, the necessary effect of which is to impose heavy burdens upon the property of many citizens and taxpayers, it becomes amenable to the juris-

diction of equity for a breach of trust, and such court may interfere by injunction to prevent such act. (Chicago v. Collins, 224.)

18. A PRESUMPTION OF NONPAYMENT OF CITY WARRANTS arises from their having been executed in due form and their remaining in the possession of a private person claiming to own them. (Savage v. Sternberg, 751.)

19. MUNICIPALITIES ARE NOT ANSWERABLE FOR DESTROYING PRIVATE PROPERTY to prevent imminent public injury. If the destruction can be justified on the ground of public necessity, the owner has no right of recovery. Liability against the corporation is not created by a statute expressly conferring upon its officers authority to destroy property when so necessary. (Aitken v. Wells, 672.)

20. MUNICIPAL CORPORATIONS.—The acts of the officers of a municipal corporation cannot bind it, unless they are within the powers expressly granted it by its charter, or fairly implied in or incident thereto, or indispensable to the declared objects and purposes of the corporation. (Becker v. La Crosse, 874.)

21. A MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR ACTS OF ITS OFFICERS in discharging its governmental functions, as in destroying property to avert imminent public injury. (Aitken v. Wells, 672.)

22. OFFICERS—OFFICIAL DUTY—CONSPIRACY.—Although it is within the province of the mayor of a city, in his official capacity, to investigate the books of other officers of the city and give public information in relation thereto if he thinks best, it is no part of his official duty to aid individuals in obtaining an examination of such books, and a combination of persons to prevent him from rendering such aid is not a criminal conspiracy. (Tryon v. Pingree, 398.)

23. MUNICIPAL OFFICERS—DISQUALIFICATION OF TO ACT ON THE HEARING OF CHARGES.—If charges are filed with a board of directors of a municipality against the superintendent of schools accusing him with misfeasance and malfeasance in office, with conduct unbecoming a superintendent, and with disobeying the rules of the board, one of such directors who is a personal enemy of the accused and the prime mover of the charges against him, and who has announced his intention to join in a finding of guilty and in removing the accused, no matter what the evidence may be, is incompetent by reason of his prejudices to participate in the hearing of such charges. (State v. Board of Education, 706.)

See Injunction, 2, 6; Mandamus, 8, 9.

MUTUAL BENEFIT SOCIETIES.

See Insurance.

NEGLIGENCE.

1. NEGLIGENCE, LIABILITY FOR, TO WHAT EXTENDS. Negligence imposes liability for all the injurious consequences which flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. (Isham v. Dow, 691.)

2. NEGLIGENCE—RUNNING ON SIDEWALK TO ESCAPE SNOWBALLS.—The act of running on a sidewalk, to avoid being hit by snowballs, is not negligence per se, and does not, of itself, preclude a right to recover for injuries sustained by falling into an unguarded excavation while so running. The question of contribu-

tory negligence, in such a case, is for the jury. (Penrose v. Fehr, 479.)

3. NEGLIGENCE IN USE OF FIREARMS.—The act of pointing a gun at another, cocking it, and pulling the trigger, is of itself a negligent act, and the person so doing, though thinking the gun to be unloaded, is not excused from the consequences of his negligent act by reason of the care which he took prior to its commission to determine whether the gun was loaded, if in fact it was loaded and was discharged to the injury of another. (Bahel v. Manning, 381.)

4. NEGLIGENCE IN USE OF FIREARMS.—A person who cocks a gun and pulls the trigger, knowing the gun to be pointed at another person, but thinking it to be unloaded, is liable in damages to such other person for whatever injury is inflicted upon him by the discharge of the gun, unless the latter is guilty of contributory negligence. (Bahel v. Manning, 381.)

5. NEGLIGENCE—WHEN PRESUMED FROM THE HAPPENING OF AN ACCIDENT.—If a railway corporation is accustomed to pay its employés from an open window, and they are accustomed, when advancing to the window to be paid, to reach their hands partially through the opening or to rest them upon the ledge, and it appears that the window has a catch and would not fall if it were properly set, and on one occasion it did fall and injured a person who was there to receive the pay of an employé, the presumption arises from such accident that there was negligence in failing to properly set such catch. The testimony of a witness that he set such catch is not conclusive upon the jury. (Carroll v. Chicago etc. R. R. Co., 871.)

6. NEGLIGENCE—RULE WHERE BOTH PARTIES ARE NEGLIGENT.—If both parties are negligent, the true rule is, that the party who last has a clear opportunity to avoid an accident, notwithstanding the negligence of his opponent, is considered solely responsible for it. (Thompson v. Salt Lake Rapid Transit Co., 621.)

7. NEGLIGENCE—INJURY TO TRESPASSING CHILD.—A complaint alleging that while defendant was operating a dummy line of street-cars, the plaintiff, a boy five years of age, "got upon one of the cars of said dummy line, and defendant, through its servants or agents, recklessly and wantonly, or intentionally, caused plaintiff to leave said car while it was in motion, and, in consequence thereof, plaintiff suffered the injuries and damages" complained of, does not aver actionable negligence. (Jefferson v. Birmingham Ry. etc. Co., 116.)

8. JURY TRIAL—NEGLIGENCE, WHEN A QUESTION FOR THE JURY.—It is only when the evidence and all reasonable inferences to be drawn therefrom are in one way in respect to a fact in issue that the trial court is warranted in taking it from the jury. Hence in an action for injuries received from the slipping of a ladder on which the plaintiff was working, it is error to charge the jury, as a matter of law, that the ladder was defective for want of spikes to prevent its slipping. A ladder is a simple contrivance; the danger attending its use is a matter of almost common knowledge, and it is easy for a person using it to inform himself whether it is spiked to prevent its slipping. Hence it is error to charge the jury that the defendant, in the exercise of ordinary care, ought to have apprehended that some person might not make the requisite examination, and therefore might be injured in consequence of its condition. (Borden v. Daisy Roller Mill Co., 816.)

9. NEGLIGENCE—PROXIMATE CAUSE—QUESTIONS FOR JURY.—The question as to whose negligence was the direct and

proximate cause of an accident is one of fact for the jury. (Thompson v. Salt Lake Rapids Transit Co., 621.)

10. PROXIMATE CAUSE OF INJURY—WHAT IS.—If a person unlawfully, wantonly, and maliciously shoots at a dog, intending to kill it, but not knowing whether he will do so or not, and not knowing what will happen if he does not, and the dog, being hurt, but not instantly killed, runs to his master's house in close proximity, enters it through an open door into a room where is his owner's wife, rushes violently and forcibly against her, and knocks her down and injures her, the shooting of the dog is the proximate cause of her injury, and a recovery therefor may be had against the wrongdoer. (Isham v. Dow, 691.)

11. WHERE AN INJURY ACCRUES TO A PERSON BY THE CONCURRENCE OF TWO CAUSES, one traceable to another person under such circumstances as to render him liable as a wrong doer, and the other not traceable to any responsible origin, but of such efficient and superior force that it would have produced the injury regardless of the responsible cause, there is no legal liability, because no damage can, in such event, be traced with reasonable certainty to the wrongdoer as a producing cause. (Cook v. Minneapolis etc. Ry. Co., 830.)

12. NEGLIGENCE—PROXIMATE CAUSE—TWO FIRES DUE TO DIFFERENT AGENCIES BUT UNITING AS ONE AND THEN DOING INJURY.—If two fires are started, one due to the defendant's negligence and the other to some unknown cause, and they unite, so that the identity of both as independent agencies is lost before the property of the plaintiff is reached, but on reaching it, the fire as then united does injury, but the injury would have been the same from either fire had it not met and joined the other, no recovery can be had for the injuries thus inflicted. (Cook v. Minneapolis etc. Ry. Co., 830.)

13. NEGLIGENCE, CONTRIBUTORY, FACTS ESTABLISHING.—One attempting to cross a railway on a dark evening where were several tracks side by side, on three of which were rows of cars standing, and who looked for, but did not see, two trains approaching from opposite directions, and stepping between the tracks on which they were running, was injured by them, must be adjudged guilty of contributory negligence when he must have heard or seen the trains had he used his senses. (Reidel v. Philadelphia etc. R. R. Co., 328.)

14. NEGLIGENCE IN USE OF FIREARMS—CONTRIBUTORY NEGLIGENCE.—One who sits within range of a gun when he knows that it is cocked and that another is about to pull the trigger, and fails to protest or get out of range, although having time to do so, is guilty of contributory negligence precluding a recovery in case he is injured by the discharge of the gun. (Bahel v. Manning, 381.)

15. NEGLIGENCE, CONTRIBUTORY.—If it is negligent for the owner of a mill to have a ladder without any spikes in the bottom to prevent its slipping, it is equally negligent for a person experienced in the use of ladders under such circumstances, and having an ample opportunity to discover the condition of the ladder, to use it without making any test or inspection, and for his injury due to his negligence in this respect he cannot recover. (Borden v. Daisy Roller Mill Co., 816.)

16. NEGLIGENCE, CONTRIBUTORY.—One who is experienced in the use of ladders on the floors of mills and has good opportunities to know whether a ladder used by him is in a defective condition and the consequences which might result from its use while in such condition, and who uses a ladder having no spikes to prevent

its slipping, and is injured because of its slipping and falling, is guilty of contributory negligence precluding his recovery for the injuries received. (Borden v. Daisy Roller Mill Co., 816.)

17. NEGLIGENCE—RECOVERY IN THE FACE OF CONTRIBUTORY NEGLIGENCE.—A plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury to him. (Thompson v. Salt Lake Rapid Transit Co., 621.)

See Master and Servant; Railroad Companies.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER—CONSIDERATION.—One who takes negotiable paper in payment of an antecedent debt, before maturity and without notice of any defect therein, receives it in due course of business, and becomes, within the meaning of commercial law, a bona fide holder for value. (Evans v. Speer Hardware Co., 919.)

2. NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—NOTICE.—Knowledge that a note is in the hands of one of the joint makers, to be negotiated for his benefit, is sufficient notice that the other makers signed for accommodation only. (Evans v. Speer Hardware Co., 919.)

3. NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSEMENT.—One who signs negotiable paper for accommodation confers authority on the party accommodated to bind him, the accommodation signer, in favor of third persons by the issue of the paper. (Evans v. Speer Hardware Co., 919.)

4. NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER.—INDORSEMENT in blank by the payee of an accommodation note transfers the legal title, and the note thereafter passes by mere delivery to one who pays value therefor and who has full authority to demand payment of it. (Evans v. Speer Hardware Co., 919.)

5. NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSEMENT.—An indorsement of accommodation paper, without recourse by the payee, who has no interest therein to enable the paper to be negotiated, is not contrary to the usages and customs of commercial transactions. (Evans v. Speer Hardware Co., 919.)

6. NEGOTIABLE INSTRUMENTS, IDENTIFICATION — INDORSEMENT FOR.—The indorsement of a stranger to a draft, made only for the purpose of identifying the payee, is purely an irregular accommodation indorsement. (Alabama Nat. Bank v. Rivers, 95.)

7. NEGOTIABLE INSTRUMENTS.—THE LIABILITY OF AN INDORSER IS GOVERNED by the law of the place of the indorsement. (Alabama Nat. Bank v. Rivers, 95.)

8. NEGOTIABLE INSTRUMENTS.—ACCOMMODATION INDORSEMENTS, if unexplained, impose a liability on the indorser strictly analogous to the liability upon a regular indorsement. (Alabama Nat. Bank v. Rivers, 95.)

9. NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSER.—Liability of an irregular accommodation indorser is contingent, depending upon due presentment, nonpayment, and notice of dishonor; and if a draft so indorsed was, in fact and in legal contemplation, paid by the drawee, this payment constitutes a complete

defense to an action seeking to hold such indorser liable. (Alabama Nat. Bank v. Rivers, 95.)

10. NEGOTIABLE INSTRUMENTS — INDORSEMENT — DEMAND AND NOTICE—WAIVER.—If an accommodation indorser of a bill or note, with knowledge that the usual steps of demand, protest, and notice have not been taken, promises to pay, he fixes his liability to the same extent as if there had been no laches on the part of the holder, and facts which excuse demand and notice, or operate as a waiver of laches in respect to them, are deemed proof of such demand and notice, and allegations of these facts may be proved by showing a waiver of them. (Alabama Nat. Bank v. Rivers, 95.)

11. NEGOTIABLE INSTRUMENTS — INDORSEMENT. — PROMISE TO PAY or acknowledgment such as shows that the accommodation indorser assumes a liability to pay a bill or note casts upon him the burden of proving laches in regard to demand and notice, and that he was ignorant of it. (Alabama Nat. Bank v. Rivers, 95.)

12. NEGOTIABLE INSTRUMENTS.—An irregular accommodation indorser, who, without knowing that the draft indorsed is forged, receives part of the proceeds thereof from the purported payee, in payment of the latter's indebtedness to him, and surrenders his collateral securities therefor, though liable as an indorser, is not liable for money had and received, to the purchaser of the draft. (Alabama Nat. Bank v. Rivers, 95.)

13. NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSEMENT—CONSIDERATION.—To fasten liability upon an accommodation indorser of a draft, it is not necessary that any consideration should move directly to him. The contract of such indorsement is supported by the consideration moving to the payee from the person to whom he negotiates the draft. (Alabama Nat. Bank v. Rivers, 95.)

14. NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—DIVERSION OF PROCEEDS.—If accommodation makers of a note sign it to enable the accommodated party to raise money to pay his debts, the fact that the latter diverts the proceeds of the note is no defense as against a bona fide holder of the note for value. (Evans v. Speer Hardware Co., 919.)

15. NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—TRANSFER—BONA FIDE HOLDER.—An accommodation note put into the hands of the party accommodated solely for the purpose of enabling him to raise money, although made negotiable and payable at and to a particular bank, which is named as the payee, is nevertheless, good against the makers in the hands of a third party who, in good faith, received the note before due and for value, paying therefor the money called for therein. (Evans v. Speer Hardware Co., 919.)

16. NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—NOTICE.—A BONA FIDE HOLDER for value of accommodation paper taken in the regular course of business may enforce it against the makers, although he knew when he received it that it was accommmodation paper. (Evans v. Speer Hardware Co., 919.)

17. NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSEMENT—EVIDENCE.—In an action by an indorsee against an irregular accommodation indorser of a draft purchased by the indorsee from a person named therein as payee and shown to have been altered and changed and the amount thereof raised before such purchase, evidence to show by whom such indorser was asked to indorse the draft is admissible. (Alabama Nat. Bank v. Rivers, 95.)

18. NEGOTIABLE INSTRUMENTS — INDORSEMENT.—PAROL EVIDENCE is not admissible to vary the legal effect of an indorsement by showing an agreement, contemporaneously made, that the indorser should not be made personally liable, and that such indorsement was made only for the purpose of identification. (Alabama Nat. Bank v. Rivers, 95.)

19. NEGOTIABLE INSTRUMENTS — INDORSEMENT — PLEADING.—If, in an action against an indorser of a draft, he, by special plea, sets up as a defense that the draft has been paid by the drawee, a demurrer to such plea, upon the ground that payment was made by mistake, or under such circumstances that the refunding of the amount paid could be legally compelled, and it was in fact refunded, is properly overruled, as such facts constitute proper matter for replication, or could be shown under issue joined on the plea of payment. (Alabama Nat. Bank v. Rivers, 95.)

20. NEGOTIABLE INSTRUMENTS — INDORSEMENT— EVIDENCE.—If, in an action by an indorsee of a draft against the indorser, who sets up the defense of want of demand, protest, and notice of dishonor, there is evidence on the part of the indorsee that the indorser wrote to him promising to pay the draft, but the letter is not produced in evidence, the indorser is competent to testify that he has not so written to the indorsee. (Alabama Nat. Bank v. Rivers, 95.)

21.—NEGOTIABLE INSTRUMENTS—FORGED DRAFT—COLLATERAL SECURITY—EVIDENCE.—The fact that notes evidencing indebtedness were secured by the indorsement of a third person is admissible to strengthen the evidence of the holder thereof that he gave value for money received for the surrender of the notes, when it is sought to hold him, as for money had and received, on the ground that the money paid him by the maker of the notes was derived from a forged draft. (Alabama Nat. Bank v. Rivers, 95.)

22. NEGOTIABLE INSTRUMENTS—PAYMENT OF FORGED DRAFT—RIGHT TO RECOVER AMOUNT PAID.—The drawer of a forged draft, who pays it to a bank to which it has been sent for collection, may, upon discovering the forgery, recover the amount from such bank, if it has not in fact paid the money over to its principal, but has merely credited its account with the amount, and the bank may charge back to its principal the amount credited, and return the draft to it. (Alabama Nat. Bank v. Rivers, 95.)

23. NEGOTIABLE INSTRUMENTS—EVIDENCE—PRESUMPTION that a forged draft paid by the drawer upon presentation has been returned to the indorsee and payment refunded by him arises from his possession of the draft marked paid by his agent, to whom he forwarded it for collection, especially when it is mutilated in the manner used by the drawee to cancel drafts by drawing pen and ink marks through the word "paid." (Alabama Nat. Bank v. Rivers, 95.)

24. NEGOTIABLE INSTRUMENTS.—PROTEST of negotiable instruments is generally excused, or laches in respect to it waived, by whatever excuses, or amounts to a waiver of, notice of dishonor. (Alabama Nat. Bank v. Rivers, 95.)

NOTARY PUBLIC.

See Attorney and Client, 1.

NOTICE.

See Carriers, 16; Cotenancy, 5-7; Deeds, 6; Negotiable Instruments, 2; Party Walls, 1, 2.

NUISANCE.

1. NUISANCE, WHAT IS.—If a nuisance complained of will of itself produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant, he is entitled to relief by injunction. (Baltimore v. Fairfield Imp. Co., 344.)

2. NUISANCE—DIFFERENCE BETWEEN PUBLIC AND PRIVATE NUISANCES does not consist in any difference in the nature or character of the thing itself, but a nuisance is public when the danger is to the public, and private when the danger is to an individual as distinguished from the public. (Kinney v. Koopman, 119.)

3. NUISANCE.—KEEPING EXPLOSIVES, such as gunpowder, in large quantities in a public place is not a nuisance per se, without regard to the manner of its use or keeping. (Kinney v. Koopman, 119.)

4. NUISANCE.—Storing and keeping gunpowder and dynamite in large quantities near dwellings in a thickly settled portion of a city, and near a public street, is not a nuisance per se. To constitute such keeping a nuisance and impose liability for an accidental explosion there must be negligence in "keeping" or in the "manner" of keeping and storing the gunpowder. (Kinney v. Koopman, 119.)

5. NUISANCE—STORING GUNPOWDER—LIABILITY.—Storing and keeping large quantities of gunpowder and dynamite in a "wooden building" in a populous place in a city is prima facie a nuisance, and imposes a liability for an explosion thereof without specifically alleging negligence in keeping and storing it. (Kinney v. Koopman, 119.)

6. NUISANCE—PESTHOUSES, INJUNCTION AGAINST.—The erection and maintenance of a pesthouse in the vicinity of a city and adjoining a tract of land which has been divided into building lots, many of which have been sold, and upon several of which buildings have been erected for use as residences, may be enjoined When, however, the pesthouse is in a suitable place when erected and first used, persons who subsequently locate near it are not entitled to abate it. (Baltimore v. Fairfield Imp. Co., 344.)

7. NUISANCE—BEFOULING PURE WATER.—The discharge of impure water, such as that which has been mixed with alkali, or minerals, into a canal whose waters are used for irrigation or other useful purpose, creates a nuisance. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

8. NUISANCE, PUBLIC — BEFOULING PURE WATER.—Under the statutes of Utah, a canal company creates a public nuisance by draining seepage and surplus water from lands irrigated by the company, into another canal, carrying water for a useful purpose, from which three or more persons obtain water for irrigation, culinary, and other domestic purposes, where the water last-mentioned is thus contaminated, befouled, and rendered unfit for use by the presence of alkali salt, or mineral. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

9. NUISANCE, PUBLIC—PRESCRIPTIVE RIGHT TO MAINTAIN.—The general rule is, that there can be no prescriptive right to maintain a public nuisance. Time will not sanctify it. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

10. NUISANCE, PRIVATE — PRESCRIPTIVE RIGHT TO MAINTAIN.—To gain a prescriptive right to maintain a private nui-

sance, the use must be adverse, under a claim of right, uninterrupted, and continuous for twenty years, with the knowledge of the party whose right is invaded. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

OFFICERS.

See Arrest, 2-4, 6; Justice of the Peace, 2; Limitations of Actions, 3.

OIL WELL.

See Mechanics' Liens, 5.

OUSTER.

See Cotenancy, 2.

PARENT AND CHILD.

1. PARENT AND CHILD—ACTION FOR DEATH.—Under the Indiana statutes, the father has a right to maintain an action to recover for the injury or death of his child. (Baltimore etc. Ry. Co. v. Bradford, 252.)

2. PARENT AND CHILD.—Presumptively it is a father's duty to support his child. (Zilley v. Dunwiddie, 820.)

3. PARENT'S DUTY TO SUPPORT CHILD AFTER DIVORCE.—When a marriage is dissolved by divorce, the duty of each spouse respecting the support of their children is as before, where there is no decree of the court denying to either of them the custody of the children. (Zilley v. Dunwiddie, 820.)

4. PARENT AND CHILD—FATHER'S LIABILITY TO HIS DIVORCED WIFE FOR THEIR CHILD RESIDING WITH HER. If a wife is granted a divorce from her husband because of his cruel and inhuman treatment of her, and given the custody of their child until it is ten years of age, and after that age is reached, the father requests the child to come to his home and there reside, but does not enforce the request, and the mother permits the child to remain with her, the father is answerable for the support and maintenance subsequently furnished to it by her. (Zilley v. Dunwiddie, 820.)

5. PARENTS—LIABILITY OF A FATHER TO A MOTHER OF A CHILD AFTER THEIR DIVORCE.—The liability of a husband to his divorced wife in respect to the support of their children is the same as to any third person, unless modified by the decree of divorce. He may be liable to her for the maintenance of their children rendered while they live with her. (Zilley v. Dunwiddie, 820.)

PARTIES.

See Mandamus, 9.

PARTNERSHIP.

1. PARTNERSHIP—TORTIOUS ACTS—PARTNER'S LIABILITY.—A partner, with respect to his common-law liability, is answerable for tortious acts done by his copartner, or by any other agent of the partnership, if authorized or adopted by the firm, or if within the scope and business of the partnership. Otherwise, it is only the partner committing the tort who is liable. (Williams v. Hendricks, 32.)

2. PARNERSHIP—TORT—CUTTING TREES — PARTNER'S LIABILITY.—If one member of a partnership goes upon a person's land, and, within the scope and business of the partnership, wrongfully cuts trees on such land, this fastens upon the other partner a common-law liability to the owner of the trees for damages sus-

tained as the consequential and natural result of the tort. (Williams v. Hendricks, 32.)

3. PARNERSHIP—TORT—CUTTING TREES — STATUTORY PENALTY—PARTNER'S LIABILITY.—Under a statute imposing a penalty for cutting trees on another's land, without the owner's consent, a partner who goes thereon, and willfully, wrongfully, and knowingly commits such tort is the actual trespasser, and the only one against whom the statute gives the penalty. His copartner is not, therefore, answerable for such wrong, although it was done in the prosecution of the partnership business, where he had no knowledge of the tortious act until after it had been consummated. (Williams v. Hendricks, 32.)

4. PARTNERSHIP — CHATTEL MORTGAGE — POWER OF ONE PARTNER TO EXECUTE.—One partner may alone and without the knowledge of his copartners execute a chattel mortgage of the firm property to secure its debt. (Rock v. Collins, 885.)

5. CHATTEL MORTGAGE ON PARTNERSHIP PROPERTY for the purpose of securing a firm debt and also an individual debt due from one of the partners is void as to the individual debt and valid as to the partnership obligation. (Rock v. Collins, 885.)

6. PARTNERSHIP—DEED TO—SUFFICIENCY OF.—A conveyance of land to two partners by their firm name, consisting of a union of their surnames, is sufficient to convey the legal title to such partners. (Cole v. Mette, 945.)

7. PARTNERSHIP—ACTION, WHEN DEEMED TO BE IN BEHALF OF AND NOT OF ITS MEMBERS AS INDIVIDUALS.—A complaint describing the plaintiffs as A, B, and C, late partners doing business under the name of A, B & Company, must be deemed to be for the enforcement of a partnership obligation, and not as in support of an action commenced by the members as individuals. (Painter v. Munn, 170.)

8. PARTERSHIP—INVALID LEVY AGAINST ONE PARTNER ON FIRM PROPERTY—RIGHT OF ACTION.—If a levy of execution against one partner, on partnership property, is void, and there has been a wrongful sale and conversion of the property, the partners have a joint right of action for such conversion. (Kunze v. Cox, 480.)

9. PARTNERSHIP—CONSENT OR RELEASE BY ONE PARTNER ONLY.—In an action for wrongfully suing out an attachment against a partnership, it is no defense that one of the partners assented to such attachment. The partnership cannot be deprived of the right to redress wrongs committed against it by an estoppel or release of one of its members. (Painter v. Munn, 170.)

See Attachment, 14; Execution, 8-14, 16, 20, 21; Trade-names; Trover.

PARTY WALLS.

1. DEEDS — PARTY-WALL AGREEMENT. — An agreement signed, sealed, and acknowledged, sufficient in form to constitute a deed, mutually securing a joint interest in a party-wall between adjacent landowners, is properly admitted to record as a deed, and constitutes notice to subsequent purchasers. (Parsons v. Baltimore B. & L. Assn. 769.)

2. DEEDS—PARTY-WALLS—COVENANTS.—If one of the parties to a deed of a party-wall covenants that he or his grantee shall pay one-half of the expense of constructing such wall whenever he shall make use of it, and stipulates that such covenant shall run with the lot, a lien is thereby created thereon which is binding upon a subsequent purchaser, although he has not assumed the liability personally, and has no notice thereof, other than that the

record of the deed affords. (Parsons v. Baltimore B. & L. Assn. 769.)

3. PARTY-WALLS—ASSIGNMENT OF PROMISE TO PAY FOR.—If one of the parties to a deed to a party-wall covenants that he or his grantee will pay onehalf of the cost of construction whenever he makes use of such wall, such covenant is personal to the party constructing the wall, and his assignee may maintain suit to enforce the payment of such liability. (Parsons v. Baltimore B. & L. Assn., 769.)

PATENT RIGHTS.

See Taxation, 3.

PERISHABLE PROPERTY.

See Attachment, 4, 5.

PEST-HOUSES.

See Municipal Corporations, 4-6; Nuisance, 6.

PLEADING.

1. PRACTICE.—EXCEPTIONS TO CONCLUSIONS OF LAW upon a special finding of facts admit the truth of the facts found. (Indiana etc. Ry. Co. v. Doremeyer, 264.)

2. PLEADING—OBJECTION TO SUFFICIENCY OF COMPLAINT.—When a complaint states a cause of action in general terms, an objection that the allegations are indefinite, or uncertain, or ambiguous, cannot avail the objector after judgment, if the objection was not made, in the proper way, before judgment. (Maynard v. Locomotive Engineers' etc. Ins. Assn. 602.)

3. PLEADING—WHEN A GENERAL DEMURRER SHOULD BE OVERRULED.—If the statute requires that a demurrer shall distinctly state or specify in what the objection or defect consists, it is proper to overrule a general demurrer to pleas, such as one declaring that the pleas fail to state facts material and relevant to the issue. (Shahan v. Alabama etc. R. R. Co. 20.)

4. PRACTICE—MISJOINDER.—A complaint containing two distinct and independent causes of action in the same count, one for damage for interfering with the plaintiff's property, and the other for damage to his reputation, is bad for misjoinder. (Gore v. Condon, 352.)

5. PLEADING, "IN SHORT," BY CONSENT—REFERENCE TO EXHIBITS—INTERPRETATION.—If a plaintiff consents that a plea shall be taken "in short," merely giving a skeleton or outline of the defense, without stating the facts constituting it, but referring to exhibits attached to, and forming a part of, the plea, the pleading must be interpreted as if the outlines were filled, or drawn out in extenso, averring the particular facts, so far as they may be deduced from the exhibits, essential to constitute the defense they indicate. (Steele v. Walker, 62.)

6. EQUITY—PLEADING.—A demurrer to a bill in equity confesses only such matters of fact as are well pleaded and not conclusions or inferences of law or fact; and when fraud is averred in general terms, and no facts are alleged constituting the fraud, the court cannot consider the averment in passing upon the demurrer, as such averment is a mere conclusion of the pleader. (McCreery v. Berney Nat. Bank, 105.)

7. PRACTICE.—PARTIES IN CHANCERY MUST REDUCE TO WRITING OBJECTIONS to the admissibility of evidence in-

corporating them in the note of submission or otherwise call them directly to the attention of the chancellor. Otherwise, such objections are deemed to have been waived. (Babcock v. Carter, 193.)

8. PLEADING — EQUITY — MULTIFARIOUSNESS—REPUGNANCY.—A bill in equity is not multifarious or repugnant because it prays that a former decree, annulling a conveyance as fraudulent, be reviewed and corrected for the reason that the complainant was not a party to the suit, or, if that is not the appropriate relief, to have such former decree impeached for fraud on the part of the complainant's trustee, who was a party to the suit. (Lebeck v. Fort Payne Bank, 51.)

See Adverse Possession, 8, 9; Insurance, 31-34; Negotiable Instruments, 19; Waters, 1.

POLICE POWER.

ADULTERATION OF FOOD—GUILTY KNOWLEDGE.—It is competent for the legislature, in the exercise of its police power, to prohibit, under a penalty, the sale of adulterated articles of food or drink, although the salesman may have no knowledge of their adulteration. One making such sales must do so at his peril. (People v. Snowberger, 449.)

See Eminent Domain.

PRESCRIPTION.

See Easement; Nuisance, 9, 10; Waters and Watercourses, 15.

PRESUMPTIONS.

See Accounts, 2; Adverse Possession, 7; Cotenancy, 3; Damages, 2; Deeds, 1, 7; Evidence, 2; Judgment, 2; Justice of the Peace, 2; Municipal Corporations, 18; Negligence, 5; Negotiable Instruments, 23; Parent and Child, 2.

PRIORITY.

See Assignment; Banks and Banking, 1; Mortgages, 13; Wages.

PROBATE COURT.

See Homestead, 6.

PROCESS.

1. PROCESS—EXEMPTION OF ATTORNEYS FROM SERVICE OF.—An attorney at law is privileged from the service of process, such as a summons, while attending upon the supreme court, or while going thereto from the county of his residence, or returning therefrom to the same place. (Hoffman v. Bay Circuit Judge, 458.)

2. PROCESS—EXEMPTION OF ATTORNEYS FROM SERVICE OF.—A STATUTE exempting an attorney at law from arrest on civil process during a sitting of court does not deprive him of his common-law privilege of exemption from service of process while attending court, or while going to, or returning therefrom. (Hoffman v. Bay Circuit Judge, 458.)

3. PROCESS—ADMISSION OF SERVICE—WAIVER OF SERVICE.—While a bare admission of the fact of service of process beyond the territorial jurisdiction of the court should not be deemed a waiver of service, yet an admission of service so worded as to clearly evidence an intent to waive further service should be held to amount to a waiver. (Jones v. Merrill, 475.)

4. PROCESS — AMENDMENTS.—Courts have inherent power over their process, and may allow clerical errors and omissions by

inadvertence to be amended at any time outside of statutes enabling them to amend. (Miller v. Zeigler, 777.)

See Attachment, 9.

PROHIBITION.

1. PROHIBITION MAY ISSUE TO PREVENT A COURT FROM VACATING ITS JUDGMENT when it has lost jurisdiction to do so. (State v. Superior Court, 724.)

2. PROHIBITION—WRIT OF AGAINST A DISQUALIFIED JUDGE OR OFFICER ACTING AS A JUDGE.—A writ of prohibition should issue to prevent a school director from participating in hearing and determining charges against a superintendent of schools, when the director is shown to be a personal enemy of the accused, to have been instrumental in having the charges preferred, and to have announced his intention to vote for his removal, no matter what the evidence should be. (State v. Board of Education, 706.)

See Negotiable Instruments, 24.

PROXIMATE CAUSE.

See Negligence, 9-12.

RAILROAD COMPANIES.

1. RAILROAD COMPANIES — OVERCHARGES — PENAL STATUTE.—Statutes imposing penalties for overcharges in freight or passenger rates by railroad companies are penal in their nature, and must be strictly construed. (Hall v. Norfolk etc. R. R. Co. 757.)

2. RAILROAD COMPANIES—OVERCHARGES BY AGENT—PENAL STATUTE.—A railroad company is not liable for the penalty or punishment imposed by statute for making overcharges in freight or passenger rates, when such overcharge is made by its conductor, unless the company has authorized or approved his act. (Hall v. Norfolk etc. R. R. Co. 757.)

3. RAILROADS—EXPULSION OF PASSENGER—DAMAGES. If a passenger is unlawfully expelled from a railway train by the conductor thereon for refusal to pay fare, and such expulsion is entirely due to the fault and negligence of the ticket agent of the railway company in improperly making out his ticket, the company is liable to him for compensatory damages, such as for the humiliation suffered, and for the delay in completing the journey. (Hot Springs R. R. Co. v. Deloney, 913.)

4. RAILROADS—EXPULSION OF PASSENGER.—If a railway conductor informs a passenger that he must pay fare or get off the train, and stops it for that purpose, on his refusal to pay, such conduct on the part of the conductor is equivalent to an expulsion of the passenger from the train. (Hot Springs R. R. Co. v. Deloney, 913.)

5. RAILROADS — EXPULSION OF PASSENGER—MENTAL ANGUISH AS ELEMENT OF DAMAGE.—Although a passenger is wrongfully expelled from a railway train after explaining the situation to the conductor, he cannot recover for mental anguish caused by the resulting delay in reaching a sick relative. In such case, the mental anguish is too remote to enter as an element of damages. (Hot Springs R. R. Co. v. Deloney, 913.)

6. NEGLIGENCE—INJURY TO TRESPASSING CHILD.—The failure of a street railway company to so guard its cars as to prevent a trespassing child, five years of age, from getting on or off, or from being thrown or falling from such cars while being op-

erated and in motion, is not negligence for which the company can be held liable. (Jefferson v. Birmingham Ry. etc. Co., 116.)

7. RAILWAYS—LIABILITY FOR INJURY TO TRESPASSERS OR LICENSEES.—One who goes upon the private grounds of another under a mere license from the latter does so subject to the attendant risks. Hence, if a trespasser, or even licensee, in passing over a railroad track, on the unfenced grounds of the company, is tripped by a semaphore wire and hurt, the company is not answerable for the injury. (Clark v. Michigan Cent. R. R. Co., 442.)

8. RAILROAD COMPANIES—LIABILITY FOR INJURY TO TRESPASSERS—DUTY TO GIVE SIGNALS.—The object of statutes requiring the sounding of a whistle or the ringing of a bell upon the approach of a train at a highway crossing is to warn persons, with vehicles and driving animals, and those having a right to use the highway and crossing. Trespassers cannot complain if the statute is violated. (Baltimore etc. Ry. Co. v. Bradford, 252.)

9. RAILROAD COMPANIES—LIABILITIES FOR DEATH OF TRESPASSING CHILD—FAILURE TO GIVE SIGNALS.—A railroad company is not liable for the death of a trespassing child which has wandered upon its track and has been killed by a passing train of cars, merely because it failed to give the statutory signals required at crossings. The object of such signals is to warn persons who have a right to use such crossings or to be upon the track. (Baltimore etc. Ry. Co. v. Bradford, 252.)

10. RAILROAD COMPANIES—LIABILITY FOR DEATH OF TRESPASSING CHILD.—Although a child two years old is non sui juris and negligence cannot be predicated upon its own conduct, its tender age does not prevent it from becoming a trespasser upon a railroad track and as such the railway company owes the child no duty, except that if it is discovered in a place of danger the company must use every effort to prevent its injury, and is not liable for the death of such child unless guilty of negligence. (Baltimore etc. Ry. Co. v. Bradford, 252.)

11. RAILROAD COMPANIES—LIABILITY FOR DEATH OF CHILD—FAILURE TO FENCE TRACK.—A railway company is not liable in damages for the death of a very young child which has wandered upon its track and is killed by a passing train, merely because it has failed to fence its right of way, as required by statute. Such statute imposes no duty to fence as respects children. (Baltimore etc. Ry. Co. v. Bradford, 252.)

12. RAILWAYS—FAILURE TO FENCE TRACK—INJURY, WHEN NOT DUE TO.—If a statute imposes on a railway corporation the duty of fencing its track, and declares that until this duty is performed, it shall be liable for all injuries to animals occasioned by the want of such fence, and animals enter upon the track, which had never been fenced, and are killed, the corporation is not liable therefor, if, though the track had been fenced, the fence must have been destroyed by a fire immediately preceding such entry, this fire being the cause of the turning of the animals out of their stable and their going upon the track. (Cook v. Minneapolis etc. Ry. Co., 830.)

13. RAILWAYS — UNLAWFUL SPEED OF TRAINS—CONTRIBUTORY NEGLIGENCE.—Though a person trespassing on a railway track is injured by a train running within the limits of a municipality at a rate of speed forbidden by the ordinance, he must, to entitle him to recover, prove that his injury was caused by the rate of speed without any direct contributory negligence on the part of himself. The negligence of the railway company in disregarding the ordinance does not excuse, nor in any way

justify, negligence on the part of the person injured. (Reidel v. Philadelphia etc. R. R. Co., 328.)

14. NEGLIGENCE IN RUNNING TRAINS FASTER THAN PERMITTED BY MUNICIPAL ORDINANCE.—The violation of a municipal ordinance regulating the speed of railway trains is not such negligence per se as will afford a right of action. The person injured must have been in a position to entitle him to the protection that the ordinance was designed to afford, and he must show how and under what circumstances the duty arose to him personally, and how it was violated by the negligence of the defendant, to his injury. (Reidel v. Philadelphia etc. R. R. Co., 328.)

15. RAILROAD — OBSTRUCTED CULVERTS — FLOODING PROPERTY—LIABILITY.—A railroad company is answerable in damages for flooding the plaintiff's store where it is caused by obstructions which prevent the escape of water, coming from a rainfall, through and beyond the culvert under the defendant company's embankment or roadbed. (Shahan v. Alabama etc. R. R. Co., 20.)

16. RAILROADS —OBSTRUCTED CULVERTS — FLOODING PROPERTY—CONTRIBUTION TO INJURY—LIABILITY.—A railroad company is answerable in damages for flooding a person's property, by allowing its culvert under the roadbed or embankment to become obstructed, so as not to carry off the water, where its negligence contributes proximately to the injury, although another company, or other causes, may have also contributed to the result. (Shahan v. Alabama etc. R. R. Co., 20.)

17. RAILROADS — OBSTRUCTED CULVERTS — FLOODING PROPERTY — CO-OPERATION OF SPURTRACK IN CAUSING INJURY—PROPER CROSS-EXAMINATION.—In an action to recover damages against a railroad company for overflowing the premises of the plaintiff, by allowing a culvert under its embankment or roadbed to become obstructed, so as to prevent the escape of water coming from a rainfall, there can be no recovery where it is shown that there would have been no overflow had the defendant not constructed a spurtrack for the convenience of the plaintiff. Hence, there is no error in permitting the defendant, on cross-examination, to prove that the spurtrack was built at the plaintiff's request. (Shahan v. Alabama etc. R. R. Co., 20.)

18. RAILROADS—STREET RAILWAYS—DUTY AND CARE.—A street-car company, as well as a person traveling upon a public street, is bound to exercise such ordinary care, prudence, and precaution to avoid injury as the surrounding circumstances may require. (Thompson v. Salt Lake Rapid Transit Co., 621.)

19. RAILROADS—STREET RAILWAYS—DANGEROUS PROPELLING POWER—CARE REQUIRED.—The duty of a street-car company to recognize the rights of persons in the lawful use of the streets is imperative, and if it adopts a propelling power, such as electricity, which increases the hazards of such persons, it must be held to a degree of care proportionate to the increase of danger. (Thompson v. Salt Lake Rapid Transit Co., 621.)

20. RAILROADS —STREET RAILWAYS — APPLIANCES — DUTY—NEGLIGENCE.—It is the duty of a street-car company to have the usual appliances required for starting, stopping, and controlling its cars, when propelled by electricity, for, without these appliances to control and manage them, they become dangerous. It is, therefore, gross negligence for the company to put an electric-car upon a track in a public street, and allow it to run without such appliances. (Thompson v. Salt Lake Rapid Transit Co., 621.)

21. RAILROADS — DEFECTIVE APPLIANCES — NEGLIGENCE.—If a street-car company has repeated notice of defective

brakes, and a defective motor, on one of its electric-cars, but fails to remedy the defects, and the motorman, in running the car, sees a person approaching the track, with the evident intention of crossing, without looking up or seeing the car, and makes a strenuous effort to stop it by applying the brakes, which are so defective that they do not work, and he receives a shock from the defective motor, which delays his purpose for a second, so that he cannot stop the car until such person is struck and fatally injured, because of the defective brakes, a clear case of negligence on the part of the defendant company, in not providing proper appliances, is presented, especially where the car runs over fifty feet past the place of the accident before it is stopped, but could have been stopped, when the first effort was made, within eight feet, had it been in repair like other cars. (Thompson v. Salt Lake Rapid Transit Co., 621.)

22. RAILROADS—STREET RAILWAYS—DEFECTIVE APPLIANCES—LIABILITY FOR INJURY.—If a street-car company knowingly places in operation upon a public street a defective electric-car, which cannot be controlled because the brakes and appliances provided for it are out of repair, and injury is occasioned by reason of such defective brakes and appliances, the jury may properly find that the company's negligence was the proximate cause of the injury, though the injured party was negligent, if the motorman was unable to avoid the latter's contributory negligence. (Thompson v. Salt Lake Rapid Transit Co., 621.)

23. RAILROADS—STREET RAILWAYS—DEFENDANT CANNOT PLEAD ITS OWN NEGLIGENCE AS A DEFENSE.—In an action against a street railway company for negligence causing death, it should not be allowed to excuse its own negligence and want of reasonable care, and thus avoid liability, by showing that prior to, and at the time of, the accident, it had knowingly been negligent in not keeping its car and appliances in order and repair, and that, on account of such negligence, it was unable to prevent the injury complained of, at the time, by the use of ordinary care. (Thompson v. Salt Lake Rapid Transit Co., 621.)

24. RAILROADS—STREET RAILWAYS — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—If a deaf and dumb, but well grown, boy, a little over fourteen years of age, having good eyesight, and possessed of average intelligence, attempts to cross a street railway track, while a car is passing, the question of his contributory negligence is properly submitted to the jury. (Thompson v. Salt Lake Rapid Transit Co., 621.)

See Adverse Possession, 8, 9; Highways, 1-3; Mandamus, 3-7.

REAL PROPERTY.

ELEVATORS, GRAIN—DANGEROUS PREMISES—USE OF RAILING NOT CONTEMPLATED.—If a customer goes to a grain elevator to buy a load of corn of the proprietor, and, while there, puts a defective railing around the opening, on an elevated platform, to a use other than that for which it was intended, by leaning against it for support, the proprietor is not answerable for an injury to his customer, occasioned by the giving way of the railing, while being so used, although he had previous knowledge of its defective condition. (Kinney v. Onsted, 455.)

See Waters, 13.

RECEIVERS.

1. CORPORATIONS—RECEIVERS OF BECAUSE OF DISSENSIONS.—If, by reason of dissensions among the directors of a trading corporation, and their equal division and consequent inabil-

ity to determine any question or adopt any resolution by a majority vote, it has become unable to carry on its business, a receiver should be appointed to take charge of, and manage, such business during the pendency of the suit. (Sternberg v. Wolff, 494.)

2. RECEIVERS—JURISDICTION OF FEDERAL COURT—SUBJECT MATTER—PARTIES—TRESPASS—REMEDY OF STRANGER—INTERVENTION.—If a receiver is appointed by a federal court, in a suit where it has plenary jurisdiction of the subject matter, the court has jurisdiction of the res, and, through the receiver, may take possession of it without regard to whether all claimants are, or are not, before it as parties. If it authorizes the receiver to take possession, the remedy of a stranger to the proceedings, who claims title to a part of the property, is by intervention in the suit before the federal court. He cannot maintain trespass against the receiver, on the ground that he was not made a party to the suit, for the court's order, in such a case, is not void. (Steele v. Walker, 62.)

3. JUDGMENT OR DECREE—INTERLOCUTORY ORDERS—DESCRIPTION OF PROPERTY—CERTAINTY—ILLUSTRATION.—A decretal order appointing a receiver and authorizing him to take possession of certain railroad lands, "except such portions thereof as are coterminal to and with that portion of the Mobile & Girard Railroad, extending from Girard to Troy, Alabama, and except such portions thereof as may be in the actual possession of bona fide purchasers for value from the said railroad company, and except such portions thereof as the said railroad company earned and sold in accordance with the terms and conditions of the act of Congress of June 3, 1856," is not so indefinite as to be void for uncertainty. (Steele v. Walker, 62.)

4. A RECEIVER DESIRING TO BRING SUIT IN ANOTHER STATE than that in which he was appointed should file a petition in the court in which he wished to bring his action, stating the proper facts and asking leave to sue therein. (Castleman v. Templeman, 363.)

5. RECEIVER—MAKING HIM A PARTY DEFENDANT WHEN HE SHOULD HAVE BEEN A PLAINTIFF.—When the right to sue for assessments on the capital stock of a corporation has, by a decree, been vested in a receiver, a creditor suing upon such assessment cannot, by making the receiver a party defendant, maintain the action. (Castleman v. Templeman, 363.)

6. A RECEIVER APPOINTED IN ANOTHER STATE FOR AN INSOLVENT CORPORATION may, in this state, maintain an action in its name upon a liability due it. Through comity between states a representative of a court of one state will be permitted to sue in the courts of the other when the suit does not injuriously affect the interests of the citizens of the latter nor violate its policy or laws. (Castleman v. Templeman, 363.)

7. RECEIVERS—FOREIGN—RIGHT TO REMOVE ASSETS.—A foreign receiver of a dissolved foreign partnership has no right to remove the funds of such firm out of the state, to the detriment of resident creditors thereof, or of separate creditors of the firm members, until he shows that the firm is insolvent and that such funds are necessary to satisfy partnership debts, regardless of any claim thereto by the debtor partner. (Grogan v. Egbert, 763.)

8. RECEIVERS—FOREIGN—RIGHT TO PROPERTY.—A foreign receiver cannot assert title to property within the state, as against the attachment of a resident creditor, especially when the sole purpose of the receivership is to enable the debtor to hinder, delay, and defraud resident creditors. (Grogan v. Egbert, 763.)

See Equity, 4; Wages, 1-3.

RELEASE.

See Partnership, 9; Suretyship, 11.

REPLEVIN.

1. REPLEVIN—POSSESSION.—In replevin, no recovery can be had for goods not in the possession of the defendant at the time the writ issues, except when such goods have been fraudulently disposed of, or concealed to avoid the writ. (Reid, Murdock & Co. v. Ferris, 437.)

2. REPLEVIN—POSSESSION.—No recovery can be had in replevin for property known by plaintiff to be out of the defendant's possession, or out of existence at the time of the issuance of the writ. (Reid, Murdock & Co. v. Ferris, 437.)

3. RES JUDICATA.—RECOVERY IN REPLEVIN for a portion of goods fraudulently purchased and in the buyer's possession at the time of the issuance of the writ does not bar an action of trover for the remainder of the goods, not in such possession and not taken under the writ of replevin. (Reid, Murdock & Co. v. Ferris, 437.)

RESCISSION.

See Vendor and Purchaser, 8-10.

REVOCATION.

See Arbitration and Award, 1-3.

SALES.

ASSIGNMENT OF CONDITIONAL SALE CONTRACT.—If a contract for a conditional sale provides that title shall remain in the vendor to secure the purchase price, while possession of the property is delivered to the vendee, the assignment of such contract by the vendor carries with it the right of property, together with the right of possession for condition broken, whether the default be prior or subsequent to the assignment. (Landigan v. Mayer, 521.)

SIDEWALKS.

See Negligence, 2.

SLAUGHTERHOUSES.

See Municipal Corporations, 2, 3.

SPENDTHRIFT TRUSTS.

See Husband and Wife, 5; Trusts, 1.

STATUTES.

1. STATUTES—PENAL—DEFINITION — CONSTRUCTION.—A statute imposing a penalty or forfeiture for transgression of its provisions, or for doing a thing prohibited, is penal, and must be strictly construed. (Hall v. Norfolk etc. R. R. Co., 757.)

2. CONSTITUTIONAL LAW—TAXATION OF ALIENS.—A statute imposing a tax on the employers of foreign born, unnaturalized male persons, and regulating their employment, is unconstitutional as being in conflict with the fourteenth amendment of the federal constitution, and with a provision in a state constitution providing that all taxes shall be uniform upon the same class of subjects. (Juniata Limestone Co. v. Fagley, 579.)

3. CONSTITUTIONAL LAW.—A STATUTE AUTHORIZING A JUSTICE OF THE PEACE TO IMPOSE THE COSTS OF A CRIM-

INAL PROSECUTION upon the complaining witness and to direct his imprisonment until they are paid, if such justice finds that the complaint was frivolous and without probable cause, is not unconstitutional, either as depriving a person of his liberty or property without due process of law, or as allowing an imprisonment for debt. (Colby v. Backus, 732.)

4. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT.—A constitutional provision forbidding imprisonment for debt relates only to liabilities arising upon contract, and does not forbid the enactment of a statute authorizing the imposition on a prosecutng witness of the costs of a criminal prosecution and his imprisonment until such costs have been paid, when his complaint has been found to be frivolous and without probable cause. (Colby v. Backus, 732.)

5. CONSTITUTIONAL LAW—TRUST COMPANIES—SPECIAL LEGISLATION.—A statute authorizing the formation of a corporation to act as a trustee in the execution of trusts of various kinds and to execute the offices of executor, administrator, trustee, receiver, or assignee, and exempting it from taking any oath and from giving any bond or security, except in the discretion of the court, other than the deposit of a certain amount of securities with the state treasurer, is constitutional. It is not special legislation, nor does it discriminate in favor of a class. (Roane Iron Co. v. Wisconsin Trust Co., 856.)

See Fisheries, 3, 4; Forcible Entry and Detainer; Railroad Companies, 1, 2, 8, 11, 12.

STATUTES OF LIMITATION.
See Limitations of Actions.

STRUCTURES.
See Mechanics' Liens, 5.

SUBMERGED LANDS.
See Jurisdiction, 1.

SUNDAY.
See Appeal, 21.

SUPERSEDEAS.

SUPERSEDEAS WHERE NONE IS EXPRESSLY AUTHORIZED BY STATUTE.—Where a state constitution provides that the supreme court shall have power to issue certain enumerated writs and also all other writs necessary to the proper and complete exercise of its appellate and revisory jurisdiction, it is, by virtue of its inherent powers as an appellate tribunal, authorized to issue a writ of supersedeas to preserve the status quo of the parties pending the determination of the appeal on the merits, though the statute has not provided that the bond upon appeal shall operate to suspend or supersede the judgment. (State v. Board of Education, 706.)

SURETYSHIP.

1. SURETYSHIP—EXTENT OF LIABILITY.—A surety for the purchase price of goods agreed to be purchased in carload lots is not liable for purchases made by his principal in other quantities. (Grasser etc. Brewing Co. v. Rogers, 389.)

2. SURETYSHIP—EXTENT OF LIABILITY.—A surety can insist that he cannot be bound except upon his own terms, and his

obligation cannot fairly be extended beyond the scope of his written agreement. (Grasser etc. Brewing Co. v. Rogers, 389.)

3. STATUTE OF LIMITATIONS—ACTIONS AGAINST SURETIES.—No action can be maintained against sureties, if, at its commencement, the liability of their principal to the action had ceased to exist because of the statute of limitations. (Spokane County v. Prescott, 733.)

4. SURETIES—WHEN LIABLE FOR RENEWALS.—If a bond is conditioned that the obligee shall be protected against all loss by failure of the principal to pay indebtedness now owing, or which may be contracted hereafter to the obligee, the sureties are liable for the nonpayment of renewals of existing debts, as well as for those which otherwise accrued. (Benton County Sav. Bank v. Boddicker, 310.)

5. BONDS—DELIVERY OF CONTRARY TO AGREEMENT.—A surety on a bond cannot successfully defend against it by showing that he signed it under an agreement that it was not to be delivered unless other parties also became sureties thereon, if he does not further show that the obligee, before acting upon the bond, had notice of such agreement. (Benton County Sav. Bank v. Boddicker, 310.)

6. BONDS—SURETIES, SIGNING BY—DELIVERY.—If a surety signs a bond on condition that it is not to be delivered until others named therein shall sign it, delivery of the bond without their signatures releases such surety. (Spencer v. McLean, 271.)

7. SURETY ON BOND—NOTICE OF CONDITION.—If a surety signs a bond and delivers it to his principal, with the condition that it is not to be delivered to the obligee unless other persons also become sureties thereon, and it is delivered in violation of this condition, express notice to the obligee of the condition is not essential to release the surety. It is sufficient if the surety proves knowledge by the obligee of such facts as would have caused a person of reasonable prudence to investigate and discover that the delivery was not authorized. (Benton County Sav. Bank v. Boddicker, 310.)

8. BONDS—SURETYSHIP.—A bond conditioned to pay to the obligees upon a fixed basis, a certain share of any indebtedness they might have to pay as sureties is an original promise and not a collateral undertaking of surety or guaranty. (Spencer v. McLean, 271.)

9. BONDS—CONSIDERATION FOR.—A bond conditioned for the payment of all existing indebtedness of the principal and all indebtedness which may accrue is based upon a sufficient consideration, where it appears that the creation of new indebtedness was contemplated and actually took place after the execution of the bond. (Benton County Sav. Bank v. Boddicker, 310.)

10. BONDS—QUESTION FOR JURY.—Whether there was an agreement that a bond should not be delivered until signed by others is a question for the jury, when the evidence is in conflict. (Spencer v. McLean, 271.)

11. SURETY—RELEASE OF BY THE CONDUCT OF THE OBLIGEE.—The obligee, in dealing with a surety, must observe the utmost good faith, and, failing to do so, he will be discharged to the extent to which he suffers by reason of the lack of good faith on the part of the obligee. Hence, if the surety applies to the obligee for information respecting the financial standing of his principal, and the obligee makes false statements in reply, in consequence of which the surety forbore to take measures to save himself from loss, he is discharged to the extent to which he has suf-

ferred from the misstatements of the obligee. (Benton County Sav. Bank v. Boddicker, 310.)

12. SURETIES—WHEN MAY NOT ASSERT THAT AN INSTRUMENT IS INCOMPLETE.—Where sureties have placed in the hands of their principal an instrument which purports to be valid and complete, they are estopped to assert, as against an innocent holder for value, that they did not execute the instrument and that it was not to be delivered unless additional parties also became sureties thereon. (Benton County Savings Bank v. Boddicker, 310.)

13. PAROL EVIDENCE—SURETIES IN SUIT BY FOR CONTRIBUTION.—The fact that a judgment against a surety on an approval bond was recovered in the name of the plaintiff in such judgment, when it should have been in the name of the clerk of the court for the use of such plaintiff, does not constitute any defense in an action by such surety against his cosurety for contribution. (Babcock v. Carter, 193.)

14. SURETYSHIP—APPLICATION OF PAYMENTS.—If a surety under his contract is liable for the purchase price of such goods only as are sent in carload lots, and remittances sent by the purchaser, without direction as to their application, are more than sufficient to pay for such goods as were sent in carload lots and shipped prior to other lots not paid for, the remittances must be applied in payment of the carload lots, and the surety is relieved from liability. (Grasser etc. Brewing Co. v. Rogers, 389.)

15. A JUDGMENT AGAINST ONE SURETY IS ADMISSIBLE in an action by him against his cosurety for contribution for the purpose of proving its rendition and by way of inducement as evidence that the liability on which it was founded had been paid by the plaintiff. (Babcock v. Carter, 193.)

16. CORPORATIONS—LOANS GRANTED IN EXCESS OF THE SUM PERMITTED BY STATUTE.—Though a statute declares that the total liability of a corporation to anyone for moneys borrowed shall not exceed twenty per cent of the capital stock, a surety for the payment of debts existing and to be incurred in favor of the corporation cannot escape liability on the ground that the debts for which he has become answerable aggregate more than such twenty per cent. (Benton County Sav. Bank v. Boddicker, 310.)

See Limitations of Actions, 3.

TAXATION.

1. TAXATION.—AUTHORITY TO IMPOSE a tax or to exact a license must clearly appear and must be strictly construed, and if there is any doubt as to the right, it must be resolved adversely to it. (Chicago v. Collins, 224.)

2. ASSESSMENTS FOR LOCAL IMPROVEMENTS ARE SUSTAINED on the theory of special benefits corresponding in value to the cost of the improvements. (Ladd v. Portland, 526.)

3. PATENT RIGHTS—TAXATION OF.—If a corporation has valuable patent rights, the whole value of its capital stock is subject to taxation, however much enhanced by its ownership of such rights. The constitution of the United States does not compel any reduction in the amount of taxes because of such rights. (Crown Cork etc. Co. v. State, 371.)

4. CORPORATION, TAX UPON STOCK OF, WHEN NOT A TAX AGAINST THE CORPORATION.—If the taxable value of the stock of a corporation is first fixed, and there is then deducted therefrom the aggregate value of the real property owned by the corporation and the residuum divided by the number of shares of

stock, and the quotient declared to be the taxable value of each share for state purposes, and upon the value thus ascertained a state tax is levied, this is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the tax and the corporation is required to pay it, being entitled to be reimbursed by the stockholders. (Crown Cork etc. Co. v. State, 371.)

See Constitutions, 2; Municipal Corporations, 12-14; Statutes, 2.

TORTS.

See Partnership, 1-3.

TRADE NAMES.

NAME OF ANOTHER, ASSIGNABILITY OF THE RIGHT TO USE.—A partner who, on the dissolution of a partnership, has acquired from the retiring partner the right to continue business in the name of the old firm, included in which was the name of the retiring partner, cannot assign that right to a corporation formed to continue the same business. (Bagby & Rivers Co. v. Rivers, 357.)

See Injunction, 7.

TRESPASS.

TRESPASS—MARSHAL OF FEDERAL COURT—NONLIABILITY.—A marshal of a federal court, who seizes property under its order, to be held pendente lite, is not answerable in trespass to a stranger claiming title to the property. (Steele v. Walker, 62.)

TRIAL.

1. TRIAL—ORDER OF EVIDENCE.—A court has discretionary power to admit testimony out of its order. (Stephens v. Union Assurance Soc., 595.)

2. EVIDENCE TO DISPUTE ADMITTED ALLEGATIONS.—It is error to admit evidence to dispute a material allegation that stands admitted by the pleadings. (Landigan v. Meyer, 521.)

3. TRIAL—INSTRUCTIONS.—The refusal of the court to give requested instructions correctly stating the law upon an immaterial issue, is error, if other instructions are given on such issue which may mislead the jury. (Tryon v. Pingree, 398.)

4. PRACTICE.—A PLEA STATING FACTS DISCLOSED BY THE COMPLAINT is unnecessary and improper. If the elements of damage, as claimed by the complaint itself, are not recoverable, the proper way to raise this objection is by motion to strike out, by objection to the evidence offered to prove damages, or by a request for proper instructions to the jury. (Painter v. Munn, 170.)

5. EVIDENCE—AGENCY.—Error in admitting evidence in relation to an agency before such agency is shown to have existed is cured by subsequent evidence establishing such agency. (Phoenix Assurance Co. v. McAuthor, 154.)

See Instructions.

TROVER.

TROVER—CONVERSION BY OFFICER LEVYING UPON PARTNERSHIP PROPERTY.—It is not conversion for an officer to levy upon partnership property wrongfully, and to advertise it for sale. To sustain trover against him, it must appear that the partners have been deprived of the possession of the property, by removal or otherwise, under circumstances which show that the offi-

cer is legally chargeable with such deprivation. (Kunze v. Cox, 430.)

See Replevin, 3.

TRUST COMPANIES.

See Statutes, 5.

TRUSTS.

1. SPENDTHRIFT TRUSTS IN FAVOR OF THEIR CREATORS.—One cannot convey property, to be held in trust to pay the income to himself, excluding all liability to be taken for his debts, contracts, or engagements. (Brown v. Macgill, 334.)

2. TRUSTEE.—ONE WHO PARTICIPATES WITH A TRUSTEE IN A BREACH OF HIS DUTY cannot hold the fruits of such default of duty as against the cestui que trust. Therefore, if a corporation selects as its agent the assignee of an insolvent to buy in his property at execution sale, and he buys it in at much less than its value, when he might have redeemed it or prevented the sale, such corporation can hold such property only for the purpose of indemnifying him for the amount so paid. (Hazen v. Lyndonville Nat. Bank, 680.)

3. TRUSTS—CESTUI QUE TRUST IS NOT BOUND UNLESS HE IS A PARTY.—Except in cases where a trustee is empowered to represent the beneficial interests, or where the interested parties are so numerous that it is impracticable to bring them all in, a cestui que trust is not bound by any proceeding in equity to which he is not a party, although the trustee is a party. It is otherwise in a court of law. (Lebeck v. Fort Payne Bank, 51.)

See Husband and Wife, 5; Judgment, 7; Statutes, 5.

VARIANCE.

See Attachment, 13.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER.—MARKETABLE TITLE to land is one of such character as assures to the purchaser the quiet and peaceable enjoyment of the property, free from encumbrance. (Barnard v. Brown, 432.)

2. VENDOR AND PURCHASER.—TITLE BY ADVERSE POSSESSION is a marketable title. (Barnard v. Brown, 432.)

3. VENDOR AND PURCHASER—MARKETABLE TITLE.—TITLE BY ADVERSE POSSESSION is sufficient to meet a contract for the sale of land assuring to the purchaser a title which is marketable and free from doubt, together with the quiet and peaceable enjoyment of the property. (Barnard v. Brown, 432.)

4. VENDOR AND PURCHASER—CONTRACTS—MARKETABLE TITLE.—A purchaser of land under a contract requiring the vendor to execute and deliver a good and sufficient warranty deed, so as to convey the land in fee and unincumbered, is entitled to a good and marketable title merely, and is not entitled to a perfect record title. (Barnard v. Brown, 432.)

5. EVIDENCE—BURDEN OF PROOF—INNOCENT PURCHASER.—As a general rule, the burden of proving that one is an innocent purchaser without notice of prior equities is on the purchaser, yet when a subsequent purchaser proves his purchase and payment for the land, the onus shifts to the person asserting the

equity or encumbrance to show notice thereof to the purchaser. (Block etc. Iron Co. v. Holcomb-Brown Co., 319.)

6. VENDOR AND PURCHASER—PURCHASE FROM EXECUTOR—ESTOPPEL.—A vendee in possession of the property of an estate of a deceased person acquired under purchase from an executor or administrator cannot retain such possession and defend, when sued for the purchase money, on the ground that the executor or administrator from whom he purchased and received possession had no authority to make the sale and could convey no title. (Union Stave Co. v. Smith, 140.)

7. VENDOR AND PURCHASER—ESTOPPEL TO DENY AUTHORITY OF VENDOR TO CONVEY.—If a person in possession of land, not claiming it in his own right, sells it for a consideraton, and puts the vendee, who has knowledge of his vendor's title, in possession, such vendee cannot, without surrendering possession, defend against the recovery of the purchase price by his vendor, upon the ground that the latter had no authority to sell, and conveyed no title. (Union Stave Co. v. Smith, 140.)

8. RESCISSION OF A CONTRACT TO PURCHASE LAND—COVENANTS OF WARRANTY.—If a purchaser of real property receiving a conveyance with covenants of warranty enters into possession thereof, and neither fraud nor insolvency is imputable to his grantor, a court of equity will not decree a rescission of the contract for failure of title, because the purchaser is protected by his covenants. (Fields v. Clayton, 189.)

9. CONVEYANCE.—THE REFUSAL OF A GRANTOR TO CORRECT A MISTAKE in a description of property conveyed by him with covenants of warranty and of which his grantee has taken and holds possession, while it may amount to a breach of such covenant, does not entitle the grantee to a rescission. His remedy is by an action on his covenants or a suit to reform the conveyance. (Fields v. Clayton, 189.)

10. RESCISSION.—THE GRANTOR OF LAND DOES NOT ASSENT TO A RESCISSION, where he takes a mortgage from the grantee to secure the payment of the purchase price, by conveying the same realty to a third person subject to the equity of redemption of the first grantee and mortgagor. (Fields v. Clayton, 189.)

11. VENDOR AND PURCHASER—MISTAKE—TITLE IN UNITED STATES—DUTY OF VENDEE.—If one sells land, to which he is supposed to have a good title, but the purchaser subsequently ascertains that the title is in the United States, and that the land is open to entry, he is under no duty or obligation, legal or equitable, to the vendor to enter the land for him and perfect the title for the latter's benefit. (Frix v. Miller, 57.)

12. VENDOR AND PURCHASER—COLLUSIVE EVICTION—ACTION FOR BREACH OF WARRANTY.—A collusive eviction is of no force or effect in an action for a breach of warranty. If the collusion appears, the action cannot be sustained. (Frix v. Miller, 57.)

13. VENDOR AND PURCHASER—EVICTION UNDER TITLE PARAMOUNT—BAR TO ACTION FOR BREACH OF WARRANTY.—The loss of land by eviction under a paramount title is purely a matter of legal cognizance, and an eviction, pretended and not real, is pleadable in bar to an action for a breach of warranty. (Frix v. Miller, 57.)

14. VENDOR AND PURCHASER—EVICTION UNDER TITLE PARAMOUNT—BAR TO ACTION FOR BREACH OF WARRANTY—ILLUSTRATION.—If land, after its purchase, is discovered to be public, and the buyer's son, without fraud or collusion

with his father, enters it as a homestead solely for his own use, the fact that neither one informs the vendor of the public character of the land does not affect the purchaser's right of action for a breach of warranty, if he is evicted by his son, or surrenders possession to him under the latter's paramount title so acquired, but a fraudulent or collusive eviction would be a defense. (Frix v. Miller, 57.)

WAGES.

1. WAGES—PRIORITY OF CORPORATION EMPLOYES OVER BONDHOLDERS—RECEIVER.—THE EQUITABLE DOCTRINE that employés of a corporation, which has passed into the hands of a receiver, on a bill for foreclosure, and the like, filed by, or in behalf of, the holders of its bonded indebtedness, secured by mortgage or deed of trust, are given a preference, or priority of payment, over the bondholders, in respect to wages earned within a short period before the appointment of the receiver, is not confined to railway corporations, but applies to private corporations, such a mining and coke manufacturing concern. (Drennen v. Mercantile Trust etc. Co., 72.)

2. WAGES—PRIORITY OF CORPORATION EMPLOYES OVER BONDHOLDERS—RECEIVER—DIVERSION OF GROSS INCOME.—If a private corporation, such as a mining and coke manufacturing concern, passes into the hands of a receiver, on a bill for foreclosure, filed by the trustee of the holders of its bonded indebtedness, which is secured by a deed of trust, and the gross income of the corporation has been, in one form or another, diverted from the payment of wages due its laborers and operatives, and converted, directly or indirectly, to the use and benefit of the bondholders, such wages, and the accounts of supply or materialmen, for labor done and supplies furnished recently before the appointment of the receiver, are entitled, in equity, to preference and priority of payment over the bondholders. (Drennen v. Mercantile Trust etc. Co., 72.)

3. WAGES—PRIORITY OF CORPORATION EMPLOYES OVER BONDHOLDERS—RECEIVER—PREFERENCE AS TO "MONEYED ASSETS."—If laborers to whom wages are due from a private corporation, intervene, by petition, in a pending suit for the appointment of a receiver and the foreclosure of a mortgage given to secure the company's bonded indebtedness, averring that the company, when the receiver was appointed, held and owned accounts or claims for products sold, for a large amount, such accounts, or their proceeds, constitute "moneyed assets," which are a part of the gross earnings of the corporation, and they belong to the employés in preference to the bondholders. If they are still uncollected in the hands of the receiver, the petitioners, under a general prayer for relief, are entitled to have their claims charged upon them; if they have been collected and the money is in the hands of the receiver, the petitioners are entitled to have their debts paid out of it; and if their proceeds have been paid to the bondholders, or expended in the administration of the receivership, the claims of the petitioners, under a special prayer for relief, should be made a charge on the corpus of the mortgaged property, and paid out of the first moneys coming into the hands of the receiver. (Drennen v. Mercantile Trust etc. Co., 72.)

4. WAGES—PRIORITY OF CORPORATION EMPLOYES OVER BONDHOLDERS—RECEIVER—EQUITY MUST BE SHOWN.—Wages and accounts of laborers and employés of a corporation, accruing recently before the appointment of a receiver, are, under proper averments and proof, enforceable to the extent that the work or services performed contributed to the permanent

improvement or betterment of the property, or were necessary to keep it a "going concern," but the equity of the laborers or employés, as against bondholders, cannot be supported on either of these grounds unless the petition states the facts justifying it. (Drennen v. Mercantile Trust etc. Co., 72.)

WAIVER.

See Contracts, 6; Insurance, 22-28; Negotiable Instruments, 10, 24; Process, 3.

WAREHOUSEMEN.

See Carriers, 3.

WARRANTS.

See Mandamus, 8, 9; Municipal Corporations, 18.

WASTE.

See Execution, 22.

WATERWORKS AND WATER COMPANIES.

1. WATER COMPANIES—PURPOSE OF—HOW TO BE DETERMINED.—The purposes and powers of an incorporated canal company to carry water must be determined from its charter, and not from the opinions of witnesses. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

2. WATER COMPANIES—CHARTER OF—WHAT CONSTITUTES.—If a canal company, with a special charter, and organized to carry water, is incorporated under the general laws of the state, its articles of incorporation, under such laws, have the effect of a charter, and in them its purposes and powers must be found. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

3. WATER COMPANIES—POWERS WHICH MAY BE EXERCISED.—A corporation, organized under the general laws of the state, such as a canal company to carry water, can exercise only such powers as are expressly mentioned in its charter, and such as may be necessary to execute those expressed. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

4. WATER COMPANIES — INCONSISTENT RIGHTS — BEFOULING WATER—EXCLUSION.—Two rights, which are perfectly inconsistent, cannot be enjoyed together. Thus a canal cannot be used to carry water fit for irrigation and water unfit for irrigation at the same time, for a use of it for one of the purposes is an exclusion of the other. Hence, if an incorporated canal company is authorized, by its charter, to divert water from a stream, to prevent overflow, and also for the purpose of irrigation and cultivation of lands, the use of its canal for the drainage of water unfit for irrigation excludes the use of its water for irrigation or domestic purposes, and the drainage through it of water unfit for irrigation is therefore excluded. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

5. WATER COMPANIES — CONTAMINATED SEEPAGE — RIGHT TO CONDUCT INTO PURE WATER CANAL.—Canal companies have no right to conduct water through their canals onto lands irrigated by them, and then, by means of drain ditches, conduct the seepage and surplus water therefrom, rendered unfit for irrigation or domestic uses by contract with alkaline or mineralized matter, into a canal, out of which persons have the right to take

water for useful purposes. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

6. WATER COMPANIES—RIGHT TO CUT RIM OF LAKE.—The fact that a lake overflows its rim, when the water is high, and that water, unfit for irrigation or domestic purposes, runs therefrom into a canal from which persons have the right to take water for useful purposes, does not authorize another canal company to cut a drain ditch through the rim, or higher intervening ground, and conduct such water as will not overflow into the canal intended to carry water for useful purposes. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

7. WATER COMPANIES — SEEPAGE WATER—DUTY TO CONTROL.—A canal company which diverts water from a stream for the purpose of irrigation must, under the statutes of Utah, control the seepage and surplus water from lands irrigated by it so as not to injuriously affect the rights of others. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

8. WATER COMPANIES—GRANT BY, OF RIGHT TO TAKE WATER.—An incorporated canal company, having authority, under its charter, to use its canal for the purpose of irrigation as well as drainage, may lawfully grant a right to take water from its canal for irrigation and domestic purposes, and to construct dams and gates to divert it. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

9. WATER COMPANIES—RATIFICATION OF CONTRACT TO TAKE WATER.—If an incorporated canal company verbally grants to an unincorporated association owning a canal the right to take water from its canal for irrigation, culinary, and other domestic purposes, and the association soon afterward becomes an incorporated irrigation company, succeeding to the property and rights of the unincorporated association, the canal company, by entering into a written contract with the newly incorporated company, granting it the right to take water from its canal for the same purposes, thereby ratifies the verbal agreement. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

10. WATER COMPANIES—MISTAKE AS TO GRANTEE IN CONTRACT TO TAKE WATER.—If an incorporated canal company grants a right to take water from its canal for irrigation, culinary and other domestic purposes, but, by mistake, the name of an unincorporated association, owning a canal, is used as grantee instead of its successor in interest, an incorporated irrigation company, it being the intention of both parties to have the grant made to the irrigation company, it must be held that the contract was made with the incorporated company. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

WATERS AND WATERCOURSES.

1. WATERS—ACTION — SUFFICIENCY OF COMPLAINT.—The allegations of a complaint, in a suit brought to determine the plaintiff's right to the use of water from a stream, are sufficient to withstand a general demurrer, where ownership, invasion of right, and injury are clearly and distinctly alleged, for a cause of action is stated, at least in general terms, although there is no distinct allegation as to how the plaintiff became the owner of the water right, whether by appropriation, adverse user or purchase. His title may be shown, by proof, under such general allegations. (Hague v. Nephi Irr. Co., 634.)

2. WATERS, NAVIGABLE—QUALIFIED TITLE OF OWNER TO SUBMERGED LANDS.—The title of a riparian owner to sub-

merged lands along navigable waters, and his right of access thereto, are subject to the paramount right of the United States to use the lands, without compensation to the owner, in such manner as it shall determine to be necessary in aid of navigation. (Scranton v. Wheeler, 484.)

3. WATERS—DIVERSION—RIGHT TO CHANGE PLACE OF. If a prior appropriator of water in a stream, and a subsequent appropriator, are each entitled to a certain portion of the stream, neither can change the place of diversion so as to injuriously affect the rights of the other. (Hague v. Nephi Irr. Co., 634.)

4. WATERS—DIVERSION—RIGHT TO CHANGE PLACE OF. One who is entitled to the use of water flowing in a stream, and who has diverted it, may change the place of diversion, if such change causes no injury to the rights of others previously acquired; but it is otherwise when the rights of a subsequent appropriator are injuriously affected by the change. (Hague v. Nephi Irr. Co., 634.)

5. WATERS—APPROPRIATION—EXCESS.—If persons divert the waters of a stream, for domestic purposes and irrigation, in larger quantities than is necessary for the uses intended, the excess may be appropriated by the owner of a mill for manufacturing purposes, or so much thereof as may be necessary for his use. (Hague v. Nephi Irr. Co., 634.)

6. WATERS—APPROPRIATION — EXCESS.—If more water is diverted from a stream than is necessary to satisfy the useful object or purpose of the appropriation, there is no vested right in such excess, and it may be taken by a subsequent appropriator for a useful purpose. (Hague v. Nephi Irr. Co., 634.)

7. WATERS — APPROPRIATION — RESTRICTIONS. — Whatever may be the quantity of water diverted from a stream, the extent of the appropriation is limited to the quantity necessary for the purposes for which the appropriation is made, and the intention to apply it to some useful purpose, without unnecessary delay, must also appear, in order to confer upon the appropriator a vested right thereto. (Hague v. Nephi Irr. Co., 634.)

8. WATERS—APPROPRIATION — TESTS. — Appropriation of water does not mean merely the diverting of it, but includes its use for some beneficial purpose. The appropriation, intention of the appropriator, use, and beneficial purpose, are the tests which determine the rights acquired by the diversion of a stream. (Hague v. Nephi Irr. Co., 634.)

9. WATERS—RIGHT TO DRAIN SO THAT THEY WILL REACH THE LANDS OF ANOTHER.—The owner of a pond has no right to conduct it by an artificial channel to a point on his own land, in close proximity to his line, where it must permeate the surrounding soil and percolate through into his neighbor's lands to the latter's permanent injury. (Schuster v. Albrecht, 804.)

10. WATERS — SEEPAGE — RIGHT TO FLOW ON TO ANOTHER'S LAND.—A proprietor of higher lands is entitled to the benefit of the natural flow therefrom, onto the lands of another, of surface or other water not brought there by artificial means, but it is otherwise as to water which is brought there by artificial means, such as ditches. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

11. WATERS—SEEPAGE FROM IRRIGATED LANDS.—Seepage from lands, caused by irrigation water brought in canals or other artificial ditches, cannot be regarded as natural seepage or drainage. (North Point etc. Irr. Co. v. Utah etc. Canal Co., 607.)

12. WATERS, PERCOLATING, WHAT ARE.—Waters which have fallen upon land and then percolated to the bedrock and followed it until they passed over it in a low place or through some fissure or hole therein, though they are collected together in a stream running through the fissure or rock, and afterward pass through some subterranean passage or passages and supply a spring, retain their character of percolating waters, where they wander in divers depressions or passages of unknown location, size, and direction until they finally reach a river. (Wheelock v. Jacobs, 659.)

13. PERCOLATING WATERS ARE PARTS OF THE EARTH ITSELF, as much as the soil and stones, with the same absolute right of use and appropriation by the owner of the land. Hence a proprietor of adjoining lands cannot complain of a diversion of such waters. (Wheelock v. Jacobs, 659.)

14. PERCOLATING WATERS—WHETHER CONVEYED BY A GRANT OF A SPRING.—A conveyance of a spring of water and of certain buildings and the pipe that conveys the water from the spring to the buildings gives no right to water before it reaches the spring, and consequently no right to prevent the grantor or his successor in interest from diverting percolating waters from the spring. (Wheelock v. Jacobs, 659.)

15. A PRESCRIPTIVE RIGHT TO PERCOLATING WATERS cannot be acquired. (Wheelock v. Jacobs, 659.)

See Nuisance, 7, 8; Railroad Companies, 15-17; Waterworks and Water Companies.

WILLS.

1. WILLS, NUNCUPATIVE—WHAT CONSTITUTES.—To constitute a nuncupative will each requisite of the statute must be strictly complied with, and it must also be shown that there was present, not only the animus testandi, but also the intent and mind to nuncupate. (Wiley's Estate, 569.)

2. WILLS—NUNCUPATIVE—EVIDENCE ESSENTIAL TO ESTABLISH.—To establish a nuncupative will it is imperative that two or more credible witnesses, who were present at the speaking and publishing of a will, must declare on oath that they were present and heard the testator pronounce the words, and that he at the same time desired the persons present, or some of them, to bear witness that such was his will, or words to that effect. Under the statute, the desire of the testator must be clearly manifested in some way that the witnesses bear witness to the will. (Estate of Grossman, 219.)

3. WILLS, NUNCUPATIVE—WANT OF ESSENTIALS TO.—In the absence of proof, of the testator's intent to make a will then and there, and of an explicit call upon the persons present to bear witness that such was the intended effect of the testator's declaration, the paper offered must fail as a nuncupative will. (Wiley's Estate, 569.)

4. WILLS—NUNCUPATIVE—EVIDENCE INSUFFICIENT TO ESTABLISH.—A writing prepared from the testator's dictation while ill is not a nuncupative will though the words were spoken in the presence of credible witnesses, if the testator did not manifest any wish or desire that they act as witnesses to the words as his will, and such writing was to be prepared and submitted to the testator on the following day, before which time he died. (Estate of Grossman, 219.)

WITNESSES.

1. WITNESSES—ONE WHO INTRODUCES a witness who testifies in his behalf is not bound by such testimony as being that of

a credible witness worthy of belief. (Phoenix Assurance Co. v. McAuthor, 154.)

2. DEEDS—FRAUDULENT ACKNOWLEDGMENT—COMPETENCY OF OFFICER AS WITNESS.—The fact that a justice of the peace, knowing of a fraud, took an acknowledgment of a deed by which the fraud was to be carried out, and said nothing at the time to the parties defrauded, is a circumstance that may affect his credibility with the jury, but does not make him an incompetent witness in a contest between the original parties. (Davis v. Monroe, 581.)

3. WITNESSES.—IN ALL CASES IN WHICH A WIFE is admissible as a witness against her husband she is admissible for him. (Clarke v. State, 157.)

4. HUSBAND AND WIFE AS WITNESSES.—IN A PROSECUTION FOR ADULTERY a wife is not permitted to testify against her husband. (Crawford v. State, 829.)

5. WITNESSES.—A WIFE IS A COMPETENT WITNESS TO TESTIFY IN FAVOR OF HER HUSBAND on the trial of a charge against him of having beaten her while pregnant, thereby causing the death of her child after its birth, for in all cases where personal injuries are alleged to have been committed by a husband or wife against each other, the injured one is an admissible witness for or against the other. (Clarke v. State, 157.)

6. WITNESSES—EXPERT EVIDENCE.—Witnesses who have had from eight to twenty-five years' experience in manufacturing, handling, dealing in, and shipping condensed milk are competent as experts to testify as to the effect of transferring such milk from refrigerator-cars to box-cars, and carrying it a long distance in the latter. (St. Louis etc. Ry. Co. v. Elgin etc. Milk Co., 238.)

See Assault, 1.

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